[ol. 101]

Bear Ja

No.	NAME OF EMPLOYEE		TITLE
1	Billingsley, J.R.	1	Warden
2	Davis, Floyd Jr.	3	Warden
3	Donaldson, Lee A.	5	Warden
4	Head, H.L.	1	Warden
5	Wilson, C.E.	4	Sr. Warden
6	Ramey, C.W.		Jail Phy.
7			
8			
9			
10			
11			
12			
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16			
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19			
20			
21			

Form No. 16—

DUPLICATE COPY

RATI . REPORT OF JEFFERSON COUN . JAIL

Birmingham Division For Month Ending MAY 19 66

Amount of Groceries on hand as per inventory first of month	$	957.91
Amount of Groceries bought this month	$	7,862.07
Total to account for	$	8,819.98
Amount of inventory as per attached copy this date 19	$	959.49
Amount used this month	$	7,860.49
Total number of feed days for State Prisoners		13,372
Total number of feed days for Government Prisoners		762
Convicts transferred to State Road Camps		62
Dead Heads not chargeable to State		25
County Convicts working in County Jail		
Prison days not fed (Bond, etc.) State		
Total number of feed days this month		14,221
Average cost per day to feed	$	.5527
Amount of Feed Bill rendered the State of Alabama	$	8,892.95
Amount of Feed Bill rendered to the U. S. Government	$	1,714.50
Amount of Feed Bill rendered State Convicts in transit to State Camps	$	34.67
Amount of Feed Bill rendered Dead Heads not charged to State	$	13.95
Jefferson County Convicts in Jail	$	
TOTAL	$	10,656.10

[fol. 102]

RECAPITULATION

Total Feed days in Jail	14,221
State Jail days not fed	
Jefferson County Convicts fed	
Total Jail days	
Total Jail Feed days	

APPROVED:

Chief Deputy.

Warden.

Form No. 16—

DUPLICATE COPY

RATI . REPORT OF JEFFERSON COUN . JAIL

Birmingham Division For Month Ending MAY 19 66
AND
BESSEMER DIVISION

Amount of Groceries on hand as per inventory first of month		$ 957.91
Amount of Groceries bought this month		$ 9,370.21
Total to account for		$ 10,328.12
Amount of inventory as per attached copy this date	19	$ 959.49
Amount used this month		$ 9,368.63
Total number of feed days for State Prisoners		15,903
Total number of feed days for Government Prisoners		762
Convicts transferred to State Road Camps		62
Dead Heads not chargeable to State		25
County Convicts working in County Jail		
Prison days not fed (Bond, etc.) State		
Total number of feed days this month		16,752
Average cost per day to feed		$ .5592
Amount of Feed Bill rendered the State of Alabama		$ 8,892.95
Amount of Feed Bill rendered to the U. S. Government		$ 1,714.50
Amount of Feed Bill rendered State Convicts in transit to State Camps		$ 34,67
Amount of Feed Bill rendered Dead Heads not charged to State		$ 13.98
Jefferson County Convicts in Jail		$
	TOTAL	$ 10,656.10

RECAPITULATION

Total Feed days in Jail	16,752
State Jail days not fed	
Jefferson County Convicts fed	
Total Jail days	
Total Jail Feed days	

APPROVED:

Chief Deputy.

Warden.

[fol. 103]

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DUPLICATE COPY

Date JUNE 1, 19 66

Claim of MELVIN BAILEY, SHERIFF

Address JEFFERSON COUNTY COURTHOUSE

City BIRMINGHAM, ALABAMA

AGAINST THE COUNTY COMMISSION OF JEFFERSON COUNTY, ALA., ORDER NO.

This account must be itemized, showing the date of each sale, quantities, and price per unit. (Warrant will be mailed to address given above when claim is allowed.)

Date		ITEM	@	Amount	
MAY	66	FOR FEEDING INSANE AND JUVENILE PRISONERS IN	62	55.92	
		COUNTY JAIL:		34.67	
		SHERIFF'S ALLOWANCE: (		45.50	
		TOTAL		$80.17	
					[fol 104]
		Total Amount of Claim		$80.17	

The above items received O. K.

Prices verified and found correct

The above prices re-checked by Clerk.

The above account must be O. K.'d by the County's Agent receiving items listed and sworn to before a Notary Public before being filed for payment.

STATE OF ALABAMA,
Jefferson County.

Before me, (a Notary Public, in and for Jefferson County, Alabama) personally appeared the undersigned, who upon oath says that the above account is a just, correct and proper charge against Jefferson County, Alabama, and that no part thereof has ever been paid.

Sworn to and subscribed before me this the

day of 19 L. S.

N. P.

Standard Form No. 1034
7 GAO 5030
1034-106

DUPLICATE

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

Use continuation sheet(s) if necessary

D. O. VOU. NO. _____

BU. VOU. NO. _____

U. S MARSHAL'S OFFICE, JUSTICE DEPT. BIRMINGHAM, ALABAMA
(Department, bureau, or establishment)

PAID BY

Voucher prepared at _____
(Give place and date)

Payee's Account No. JIC-27748-12-1-63 Discount Terms _____

TO (Payee) MELVIN BAILEY
SHERIFF,
(Address) JEFFERSON COUNTY COURTHOUSE, BIRMINGHAM, ALA.

Contract No. _____ Date _____ Req. No. _____ Date Invoice Rec'd. _____
Shipped from _____ to _____ Weight _____ Govt. B/L No. _____

No. and Date of Order	Date of Delivery or Service	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)			Quantity	UNIT PRICE * Cost	UNIT PRICE * Per	AMOUNT *
MAY1966:		Acres, Johnny L.	4/4/66	to 5/4-66			4	
		Anders, Lyle Gary	2/23/66	" 5/31/66			31	
		Bailey, James	5/27/66	" 5/31/66			5	
		Batchelor, Allen	10/29/65	" 5/31/66			31	
		Booth, Gary Wayne	5/24/66	" 5/27/66			4	
		Bradley, E. Presley, Jr	4/18/66	" 5/31/66			31	
		Bramlett, Sandy Jr.	2/15/66	" 5/5/66			5	
		Camp, Alwin Lee	5/16/66	" 5/31/66			16	
		Clayton, Chester Roy	4/18/66	" 5/5/66			5	
		Elam, Venell Donald	5/2/66	" 5/5/66			4	
		Elrod, Edna Marie	5/28/66	" 5/29/66			2	
		Flowers, Robert Lee	5/2/66	" 5/31/66			30	
						TOTAL		

PAYMENT:
COMPLETE ☐
PARTIAL ☐
FINAL ☐
PROGRESS ☐
ADVANCE ☐

(PAYEE MUST NOT USE THIS SPACE)

DIFFERENCES _____

Amount verified; correct for _____
(Signature or initials) _____

† Approved for _____ =$ _____
By _____
Title _____
Exchange rate _____ =$1.00

Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.

† _____
(Authorized Certifying Officer) (Date)

THE REVERSE OF THIS FORM MUST BE EXECUTED WHEN PURCHASES ARE MADE OR SERVICES SECURED WITHOUT WRITTEN AGREEMENT IN ANY FORM

ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown, other classification optional)

Paid by
Check No. _____ on Treasurer of the United States
Check No. _____ on _____ (Name of Bank)
Cash, $ _____, on _____, 19____ Payee _____

Per _____

Title _____

* When used in foreign countries, insert name of currency of country in which used.

† If the ability to certify and authority to approve are combined in one person, one signature only is necessary; otherwise the approving officer will sign on the line below "Approved for $ _____", and give his official title.

[fol. 105]

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Standard Form No. 1035—Revised
Form prescribed by
Comptroller General, U. S.
September 7, 1950
(Gen. Reg. No. 81, Supp. No. 14)

DUPLICATE

Public Voucher for Purchases and Services Other Than Personal

CONTINUATION SHEET

U. S. MARSHALL'S OFFICE, BIRMINGHAM, ALA. Sheet No. TWO of Bureau Voucher No. .....
(Department, bureau, or establishment)

No. and Date of Order	Date of Delivery or Service	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)			QUANTITY	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT Dollars	AMOUNT Cts.
MAY 1966:		Garner, Truman J.	5/31/66	to 5/31/66			1		
		Gilbreath, Clyde	11/2/66	" 5/31/66			31		
		Goodman, Shirley M.	5/6/66	" 5/20/66			15		
		Guthrie, James H.	5/13/66	" 5/31/66			19		
		Harris, Eddie Richard Jr.	12/28/65	" 5/5/66			5		
		Haynes, Jimmy Rogers	5/10/66	" 5/23/66			14		
		Jenkins, Robert Will	5/13/66	" 5/31/66			19		
		Johnson, Robert	5/18/66	" 5/23/66			6		
		Kilpatrick, Brady	5/15/66	" 5/16/66			2		
		Kimmons, Frederick	4/4/66	" 5/10/66			10		
		King, Gary	5/18/66	" 5/23/66			6		
		Kirk, Amos	5/2/66	" 5/5/66			4		
		Klasek, Janet L.	4/6/66	" 5/31/66			31		
		Lake, Herbert James	5/12/66	" 5/31/66			20		
		Lalumandier, Stephen E.	12/1/66	" 5/26/66			26		
		Lipscomb, Jefery Leon	4/18/66	" 5/4/66			4		
		Lusby, Jesse H.	5/16/66	" 5/31/66			16		
		Marlow, Elbert	5/25/66	" 5/26/66			2		
		Martin, Gary Dwight	5/31/66	" 5/31/66			1		
		Melvin, James W.	5/6/66	" 5/11/66			6		
		Miller, Daniel Wayne	5/2/66	" 5/11/66			10		
		Nelson, Claude	5/13/66	" 5/31/66			19		
		O'Neal, John T.	4/18/66	" 5/31/66			31		
		Ort, Harry Dewitt III	5/31/66	" 5/31/66			1		
		Pike, Robert E.	5/27/66	" 5/31/66			5		
		Roland, Lawrence Edward	5/29/66	" 5/31/66			3		
		Sanford, Don	5/15/66	" 5/16/66			2		
		Schnock, Virgil L.	4/6/66	" 5/31/66			31		
		Scooley, Ralph E.	5/11/66	" 5/16/66			6		
		Sholders, Leland D.	4/29/66	" 5/31/66			31		
		Short, Fred James	5/31/66	" 5/31/66			1		
		Smith, Hershell	5/26/66	" 5/31/66			6		
		Snider, Billy Wayne	5/17/66	" 5/31/66			15		
		Spigner, James	5/26/66	" 5/31/66			6		
		Stewart, Jerry D.	3/10/66	" 5/3/66			3		
		Stringer, Danny Thomas	5/21/66	" 5/31/66			11		
		Thomas, Raymond J.	5/21/66	" 5/31/66			11		
		Thomas, Willard G.	5/16/66	" 5/31/66			16		
		Tidwell, Grover L.	4/20/66	" 5/11/66			11		
		Troglen, Curtis	5/16/66	" 5/31/66			16		
		Turner, John H.	4/21/66	" 5/4/66			4		
		Turner, Leroy	5/3/66	" 5/31/66			29		
		VanArtsdalen, Clifford	5/21/66	" 5/31/66			11		
		Vines, Waymon	5/25/66	" 5/26/66			2		
		Wade, Edward James	5/31/66	" 5/31/66			1		
		Warren, James Mac	4/3/66	" 5/5/66			5		
		Wedemeyer, George	5/4/66	" 5/31/66			28		

U. S. GOVERNMENT PRINTING OFFICE 16—72946-1

[fol. 106]

DUPLICATE COPY

Standard Form No. 1035—Revised
Form prescribed by
Comptroller General, U. S.
September 7, 1956
(Gen. Reg. No. 81, Supp. No. 11)

Public Voucher for Purchases and Services Other Than Personal

CONTINUATION SHEET

U.S. MARSHALL'S OFFICE, BIRMINGHAM, ALABAMA (Department, bureau, or establishment) Sheet No. THREE of Bureau Voucher No. .....

No. and Date of Order	Date of Delivery or Service	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)	QUANTITY	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT Dollars	AMOUNT Cts.
966:		WEST, CREVEL 5/23/66 to 5/31/66			9		
		Wheeler, Jack D. 3/31/66 " 5/26/66			26		
		William, Franklin 5/13/66 " 5/16/66			4		
		Wood, Carlton Wayne 5/2/66 " 5/3/66			2		
		TOTAL	762	2.25		$1,714	.50

U. S. GOVERNMENT PRINTING OFFICE : 16-82613-1

[fol. 107]

[fol. 108]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
(NORTHERN DIVISION)
Civil Action No. 2350-N

[Title omitted]

ANSWERS OF DEFENDANT, ROBERT K. AUSTIN, WARDEN OF THE CITY JAIL OF BIRMINGHAM, ALABAMA, TO INTERROGATORIES PROPOUNDED TO HIM BY PLAINTIFFS—Filed June 25, 1966

Comes the above named defendant and, for answer to interrogatories propounded to him by plaintiffs, says as follows:

(1). City of Birmingham, Alabama.

(2). Jamie Moore, Chief of Police.

(3). Avenue F Prison (City Jail), 517 7th Avenue, South, Birmingham, Alabama.

(4) As stated in answer to interrogatory (6), no persons are employed by me as warden of the City Jail of Birmingham. As Chief Warden of the Avenue F Prison (City Jail) of Birmingham, I have supervision over the following:

Four Senior Wardens: Leland A. Holcomb, James R. Johnston, Charles T. Lamar and Cecil H. Prickett;

Twenty-four Wardens: Charles C. Acker, Alfred W. Adair, Walter E. Ambrose, Ronnie M. Bedford, Mark T. Berry, J. T. Black, James L. Boggan, Jack T. Brand, Howard T. Calton, Jimmie M. Dennis, Morris J. Ellis, William H. Goddard, Perry V. Harlow, William L. Jones, Howard E. Knox, Leon G. Medlock, Ignatus J. Milazzo, Hugh D. Nichols, Robert E. Price, Raoul L. Serrano, Jr., Oscar T. Underwood, William R. Whatley, Frank E. Williamson, Sr., John E. Yeager:

[File endorsement omitted]

Four Jail Matrons: Bertha A. Scott, Margaret L. Snider, Charlene G. Thornton, Nellie G. Williams;

One Senior Maintenance Mechanic, Robert H. Brown;

[fol. 109] One carpenter: Earnest M. Tidwell;

One Farm Supervisor: Charles H. Fredrick.

The entire force employed at the Avenue F Prison (City Jail) is a part of the Police Department of the City of Birmingham under the direct supervision of the Chief of Police as above stated. At the present time Negroes are employed in some of the divisions of the Police Department but presently none are employed at the prison or jail. The method of employment of personnel throughout the Police Department, including those having duties at the City Prison or jail, is through the Personnel Board of Jefferson County as hereinafter more fully stated in answer to Interrogatory (6). The difficulty in obtaining qualified applicants on the rosters from which vacancies are required to be filled by State Law, as I am informed, has been the reason for the failure to employ more Negroes in the Police Department. As hereinafter stated in answer to interrogatory (6), the Chief of Police, as department head, is responsible for all employment of personnel in the Police Department.

(5) This interrogatory is answered. See answer to interrogatory (4).

(6) The operation of Birmingham City Jail or prison is a part of the operation of the Police Department, the direct head of which is the Chief of Police. The Chief Administrative officer of the City is the Mayor. Every person in the Police Department and all other departments of the City are subject to the provisions of the Jefferson County Civil Service Law with respect to hiring and also firing. This procedure is pursuant to Act 248, Legislation of Alabama 1945, as amended, and under rules and procedures adopted by the Personnel Board of Jefferson County, created by said Act as amended.

(a) I am informed the procedure followed in the recruitment of personnel for the entire Police Department, including wardens, matrons and other employees of the jail, patrolmen and others requires an examination conducted by the Personnel Board at intervals to provide a roster from which names are certified for employment as needed. New examinations are given as the rosters become depleted. The first step in recruitment is to encourage eligibles to take the examination. I am reliably informed the City has made a determined and thorough effort over a period of several years to recruit Negroes for employment in the Police Department. Recently several have been employed as patrolmen. The roster for that position is full at present and contains the names of both whites and Ne- [fol. 110] groes from which future needs will be filled. To illustrate the effort made to obtain members of that race on such roster, and from which those now serving on the Police Force were selected, I am reliably informed the City of Birmingham, acting through its Mayor and other city officials, with the assistance of the Birmingham Chamber of Commerce, local Negro leaders, industrial leaders and other citizens widely distributed among Negroes, and especially those having the necessary qualifications, a brochure inviting all to take the necessary examination, regardless of race, color, religion or national origin. A true copy of such brochure, of which two or three thousand were distributed, is attached hereto and made a part hereof. Also attached and made a part hereof is a true copy of a letter written by the Birmingham Area Chamber of Commerce, distributing copies of such brochure to all of its members, Negro and white. Newspaper, radio and T.V. advertising were also used by the Personnel Board to encourage Negroes to apply for such examinations. The card filled out by each applicant to any examination conducted by the Personnel Board contains the following statement: "The Jefferson County Personnel Board provides for a public personnel system based on merit principles. It strives for the constant improvement of the public

service by employing and developing the best qualified people available, regardless of their race, color, creed, political beliefs or national origin." A true and correct replica of this card is attached hereto and made a part of this answer.

Under the law and under the rules of the Personnel Board, all vacancies for positions in the Police Department and other departments of the City are filled by selection from the rosters established in the manner above set forth. Final appointment is made by the Mayor upon recommendation of the Department head, the Chief of Police, in the case of the Police Department.

(b) All positions are filled and assignments made in the manner above set forth. However, jail matrons are selected from the roster of practical nurses, which said roster is filled in the manner above set forth. All rosters, of every position, are filled from examinations given without racial discrimination, as above stated.

(c) Discharge of employees is likewise only for cause, and under the Law and Rules cannot be effected without a hearing, after due notice of the charge, served upon the employee. The hearing is before the Personnel Board and review in the Circuit Court and Supreme Court is provided by the law, above mentioned.

[fol. 111] (7) (a) Yes, but have not given the same any particular thought.

(b) In the operation of the Birmingham City Jail, which is under my supervision, I have separated Negro and white prisoners because, in my opinion, it is necessary to do so in order to maintain the internal security of this prison or jail and protect the prisoners and others from bodily harm.

(8). (a) I was never consciously aware of this section until I read it in these interrogatories.

(b) My policy of separation of prisoners is stated in (7) (b), above.

(c) No.

(9). To the extent stated in (7) (b).

(10). All such facilities are used by both white and Negro prisoners. As stated above, it is my policy to separate white and Negro prisoners for reason contained in my answer to (7) (b) above; however, all facilities are used interchangeably.

(11). Please see answer to (7)(b).

(12). Please see answer to (7)(b).

(13). I have no authority over the construction of the Birmingham prison or jail. Such jail contains more than four separate apartments but they are used interchangeably as stated in answer to (7)(b), and (10).

(14). As stated in answer to (13), I have no authority over the construction of the Birmingham prison or jail or the facilities therein. I do supervise the proper cleaning of the jail; also please see my answer to interrogatory (13).

(15). (a) I am informed that it is.

(b) I do furnish a monthly report which lists by color, sex and age the number of prisoners confined in such jail, according to the offense charged. Only figures appear in such report with no names of prisoners given. The report for May, 1966, shows a total of 2021 prisoners for that month.

[fol. 112] (c) A copy of this report is attached hereto.

(16). (a) This section of the Alabama Code does not have application to other than County Jails and I am Chief Warden of the City prison or jail.

(b) There is no contract of this nature inquired about in existence.

(c) (d) (e) Answered, in (a) and (b).

(17). (a) No. This has never been done to the extent of my knowledge, which covers the past 29 years.

(b) (c) (d) and (e). See (a).

Robert K. Austin

Duly sworn to by Robert K. Austin (Jurat omitted in printing).

Certificate of Service (omitted in printing).

BIRMINGHAM AREA CHAMBER OF COMMERCE
1914 6th AVENUE NORTH · BIRMINGHAM, ALABAMA
35203

August 6, 1965

To the Membership

Enclosed is a pamphlet published by the City of Birmingham to interest people in a career in the Birmingham Police Department. As you know, the City has been endeavoring to fill vacancies in its Police Force for both white and Negro personnel.

This pamphlet is forwarded to you in the hope that you will bring it to the attention of your Personnel Department and encourage them to render the Mayor's office assistance by encouraging applicants who pass through your Personnel Department in excess of your needs to consider the opportunities available to them through a career in the Birmingham Police Department.

The Chamber has been endeavoring over many months to serve the City by cooperating with the Mayor's office in this matter. Anything you can do in this connection as a member of the Chamber will be a distinct service to the City.

Sincerely,

Crawford T. Johnson, III

Crawford T. Johnson, III
President

Enclosure

he extent of
Austin
t omitted in

[fol. 114]

As this folder says, a policeman's career is a real opportunity for the man who is physically fit, mentally alert and morally strong.

A guaranteed financial security on service retirement is not the only reward.

A policeman is looked up to with respect -- in his own neighborhood where his family lives -- in the times when he is a badly needed friend and rescuer -- in the times when he shows others the way to safety and respect for the law.

Promotions, for the policeman who works at it, are regular. The higher ranks of detective, sergeant, lieutenant and captain carry with them higher rank and higher pay. And, many a policeman goes on to other careers in law enforcement, in military service, in industrial security jobs and to other highly rewarding and satisfying lives.

Birmingham has a police force to be proud of and its uniform is respected everywhere. Because men are being promoted . . . because others are retiring on well earned pensions . . . because still others, because of their excellent records and training are being hired by private industry, Birmingham constantly needs police recruits.

If you are qualified physically, mentally and morally, investigate a career in law enforcement now. It could be the best decision you ever made. Do it today. Your City wants and needs you.

Sincerely yours,

Albert Boutwell

Mayor

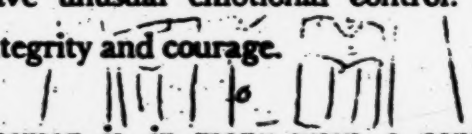
BADGE OF HONOR

A CAREER YOU CAN BE PROUD OF

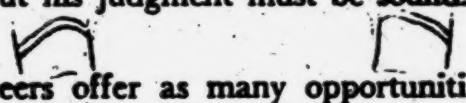
[fol. 115]

The BIRMINGHAM POLICE DEPARTMENT needs more men, but it takes a special person to be a good police officer. Are YOU one of these special people?

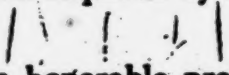
A Policeman is a community leader. He must be mentally alert, be in superior physical condition and have unusual emotional control. He must have integrity and courage.



A Policeman is, in many ways, a contradiction. He must be firm but gentle; quick to act, slow to anger; curious but silent. He must make fast decisions but his judgment must be sound.



Few careers offer as many opportunities for so many valuable contributions to the community. The man who is given such authority and entrusted with badge and gun, has the mark of leadership. Applications are received by the Personnel Board of Jefferson County, and examinations are given and graded without regard to an applicant's race, color, religion or national origin, as are all other applications and as required by law.



Police work is an honorable profession, with improving pay and excellent working conditions. It is a work in which you *and your family* can take real pride in your entering. Do it today.

A rookie in the BIRMINGHAM POLICE DEPARTMENT is given extensive training at the new Police Academy; his uniforms are furnished. His beginning rate of pay is $413. The maximum for Patrolman is $501.

All positions in the Department from Patrolman to Police Chief are filled by competitive examination since the Police Department is under the protection of the county-wide Civil Service System.

Other benefits of a police career are:

Automatic salary increases
Two weeks paid vacation per year
Paid sick leave
A sound pension plan

In order to get suitable candidates, certain minimum standards have been established. These requirements cannot be waived.

EDUCATION:	High school graduation or completion of 10th grade plus a G.E.D. certificate.
AGE:	Minimum--21; Maximum--33
HEIGHT:	5'8" to 6'4" (weight must be in proportion to height)
PHYSICAL:	Class A medical standards must be met
EXPERIENCE:	No experience is required.

WHEN AND WHERE TO APPLY

If you are interested in a police career, contact the Civil Service office; Room 301-A Courthouse Annex, Birmingham, Alabama; Telephone: 323-5311, Ext. 381.

Examinations are held twice a month; applications are issued Monday through Friday.

IDENTIFICATION NUMBER

APPLICATION NUMBER

EXAMINATION APPLICATION CARD
THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA
Room 301 Courthouse Annex, Birmingham
Phone 323-5311

NOT ELIGIBLE (SEE REVERSE SIDE) ☐

ELIGIBLE (SEE BELOW) ☐

FILING DATE (MO.) (DAY) (YEAR)

PRINT ALL INFORMATION REQUESTED ON BOTH CARDS, THEN SIGN THIS UPPER CARD ON THE BACK. DO NOT MARK ANY ITEM TO THE RIGHT OF THE DOUBLE LINES.

CLASS TITLE

NAME FIRST MIDDLE: MAIDEN LAST

ADDRESS

CITY & ZIP CODE STATE

THIS CARD MUST BE PRESENTED TO BE ADMITTED TO EXAM. YOU ARE ELIGIBLE TO COMPETE ON THE WRITTEN EXAMINATION WHICH WILL BE HELD:

QUALIFIED ☐ DID NOT QUALIFY (SEE REVERSE SIDE) ☐

TOTAL GRADE

POSITION ON ELIGIBLE LIST

Identification No.

Application No.

EXAMINATION APPLICATION CARD
THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA
Room 301 Courthouse Annex, Birmingham
Phone 323-5311

NOT ELIGIBLE ☐

ELIGIBLE ☐

(MO.) (DAY) (YEAR)

PERSONNEL USE ONLY

SENIORITY CREDIT (PROMOTIONAL ONLY)

DATE POINTS

CLASS TITLE

AGE

NAME

HOME PHONE

ADDRESS

CITY & ZIP CODE

MALE ☐

FEMALE ☐

DRIVER'S LICENSE ☐ NO. _____ Date Issued _____

WILL CANDIDATE ACCEPT TEMPORARY EMPLOYMENT?

1 MO. ☐
3 MO. ☐
6 MO. ☐

EXAM DATE _____

APPROVED _____

GRADE POSITION ON LIST

REFERAL RECORD

DATE	DEPT.	COMMENTS

(X)

	YES	NO	
HEIGHT (INCHES)_____	☐	☐	
WEIGHT (LBS.)_____	☐	☐	
PERFORMANCE TESTS			
TYPING (WPM)_____	☐	☐	_____
STENO (SCORE)_____	☐	☐	_____
OTHER _____	☐	☐	_____

DID NOT QUALIFY

1. ☐ LACK OF LICENSE OR REGISTRATION
2. ☐ AGE
3. ☐ EDUCATION
4. ☐ EXPERIENCE
5. ☐ STATUS
6. ☐ EFFICIENCY RATING
7. ☐ HEIGHT OR WEIGHT
8. ☐ INCOMPLETE APPLICATION
9. ☐ OTHER _____

THE JEFFERSON COUNTY PERSONNEL BOARD PROVIDES FOR A PUBLIC PERSONNEL SYSTEM BASED ON MERIT PRINCIPLES. IT STRIVES FOR THE CONSTANT IMPROVEMENT OF THE PUBLIC SERVICE BY EMPLOYING AND DEVELOPING THE BEST QUALIFIED PEOPLE AVAILABLE, REGARDLESS OF THEIR RACE, COLOR, CREED, POLITICAL BELIEFS OR NATIONAL ORIGIN

OPEN-COMPETITIVE

Competitive examinations furnish lists from which qualified candidates are chosen to fill vacancies.

Appointment shall be made from top 3 persons on the list.

Candidates are fingerprinted and will be required to pass a medical examination prior to appointment, as well as a strict background investigation.

Permanent employment status is granted after 1 year.

Group medical insurance is offered. Employees earn 2 weeks vacation and 2 weeks sick leave each year, plus paid holidays.

In general, standard payroll deductions are made for social security, withholding tax, and pension.

Promotional positions are filled when possible by competitive tests from within the service.

Pay increases are granted at specific intervals on a merit basis within established pay grades.

PROMOTIONAL-COMPETITIVE

Employees with permanent status in an appropriate lower class are eligible, provided they qualify on additional requirements shown on the announcement.

Qualified employees who pass written tests will be given seniority credit for satisfactory service to a maximum of 20 years.

Applicants passing the written test will be placed on an eligible list according to their test score.

The appointing authority shall appoint top person on list if he is in the department to fill a vacancy. Otherwise, Rule of 3 applies.

Employees will serve a one year probationary period at which time they will receive permanent status.

Employees with unsatisfactory probationary service may be demoted to their previous classification at the discretion of the department.

SIGNATURE

TESTS RESULTS ARE CONFIDENTIAL. FOR YOUR PRIVACY GRADE INFORMATION MAY NOT BE DISCUSSED ON THE TELEPHONE. A PERSONAL INTERVIEW IS REQUIRED FOR INFORMATION ON EXAMINATION RESULTS, WITHIN 30 DAYS OF THIS NOTIFICATION OF YOUR GRADE.

You did not achieve a qualifying score on the

- ☐ WRITTEN TEST
- ☐ PERFORMANCE TEST
- ☐ ORAL INTERVIEW
- ☐ UNASSEMBLED EXAMINATION

SCORE _____

You are not eligible for appointment because of:

1. ☐ Lack of license or registration
2. ☐ Age
3. ☐ Education
4. ☐ Experience
5. ☐ Status
6. ☐ Efficiency Rating
7. ☐ Height or Weight
8. ☐ Incomplete Application
9. ☐ Other

[fol. 117]

[fol. 118]

MONTHLY REPORT

AVENUE F. PRISON

BIRMINGHAM, ALABAMA

MAY 1966

Gentlemen:

Submitted herewith is the Monthly STATISTICAL Report of the AVENUE F. PRISON.

RECAPITULATION

AGE GROUP	16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65+	TOTAL	GRAND TOTAL
Misdemeanors	14	32	51	32	32	41	30	26	31	130	165	164	182	179	121	91	43	40		1404
Traffic Violations	7	11	16	15	12	10	13	14	13	53	49	57	39	46	28	18	6	10		417
Delivered to Sheriff	5	11	9	15	5	6	5	3	2	18	7	6	7	1	1	0	2	0		103
Delivered to Juvenile Court	1	0	0	0	0	0	0	0	0	2	2	1	0	1	0	0	0	0		7
Delivered to U. S. Marshall	0	0	1	0	0	1	0	0	0	2	1	1	0	0	1	0	0	0		7
Delivered to other Jurisdiction																				
Military	0	0	4	5	0	0	0	0	0	0	0	0	0	0	0	0	0	0		9
Investigated & Rel.	6	8	8	5	4	1	2	6	0	13	9	4	6	1	0	0	1	0		74
TOTAL	33	62	89	72	53	59	50	49	46	218	233	233	234	228	151	109	52	50		2021

Respectfully Submitted

R. K. Austin

R. K. AUSTIN
CHIEF WARDEN

MISDEMEANORS CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Assault & Battery	W.M.		1	1			1					1					1			5
	W.F.																			
	B.M.		1	3	8	1	1	1		1	4	4		2		1				20
	B.F.										1									1
TOTAL			2	4	1	1	2	1		1	5	5		2		1	1			26
Assault with a	W.M.																			
Weapon	W.F.																			
	B.M.						2				1	1								4
	B.F.						1	1			1									3
TOTAL							3	1			2	1								7
Carrying a	W.M.	1											1							1
Concealed Weapon	W.F.												1							1
	B.M.	1	2	1	1		1				1									7
	B.F.					1														1
TOTAL		2	2	1	1	1	1				1		1							10
City Escape	W.M.					1						3	2	1	2	1	1			11
	W.F.																			
	B.M.		3			2					2	1	2	1	1		1			13
	B.F.																			
TOTAL			3			3					2	4	4	2	3	1	2			24
Disorderly	W.M.		2	2	1			1	1	3	4	2	2		4		1	1	2	26
Conduct	W.F.			1			1			1				1	1					5
	B.M.	1	1	2	1	2	1		2	1	2	7	1	2	3	1	1	1		29
	B.F.			2								2	2			1	2		1	10
TOTAL		1	3	7	2	2	2	1	3	5	6	11	5	3	8	2	4	2	3	70
Drunk	W.M.	2	4	4	3	4	6	2	4	8	30	26	39	72	64	47	40	18	16	389
	W.F.						1			1	1	5	5	7	5	4				29
	B.M.	1	4	14	12	7	14	15	10	6	41	51	68	62	61	47	23	17	13	466
	B.F.		1			1	2		1	1	2	11	9	7	10	5	6			56
TOTAL		3	9	18	15	12	23	17	15	16	74	93	121	148	140	103	69	35	29	940

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Viol. State	W.M.														1					1
Firearms Act	W.F.																			
	B.M.	1	1					1		1	1		2	3						10
	B.F.										1						1			2
TOTAL		1	1					1		1	2		2	3	1		1			13
Presenting	W.M.																			
Firearms at	W.F.																			
Another	B.M.			1					1						1					3
	B.F.																			
TOTAL				1					1						1					3
Discharging	W.M.																			
Firearms in	W.F.																			
City Limits	B.M.										1	1					1			3
	B.F.																			
TOTAL											1	1					1			3
Issuing	W.M.																			
Worthless Checks	W.F.																			
	B.M.																			
	B.F.											1								1
TOTAL												1								1
Minor in	W.M.	2	7	8	6	3														26
Possession of	W.F.																			
	B.M.	1				1														
	B.F.																			
TOTAL		3	7	8	6	4														
Drinking in	W.M.																			
Public	W.F.																			
	B.M.										1									1
	B.F.																			
TOTAL											1									1

Prison - 1

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Disorderly	W.M.					2		1			1	4	2	1			1			12
Conduct	W.F.																			
(Sex Pervert)	B.M.			1			1				1									3
	B.F.																			
TOTAL				1		2	1	1			2	4	2	1			1			15
Loitering After	W.M.																			
Warning	W.F.																			
	B.M.														1					1
	B.F.																			
TOTAL															1					1
Operating Gaming	W.M.																			
House	W.F.																			
	B.M.																1			1
	B.F.																			
TOTAL																	1			1
Resisting Arrest	W.M.			2		1					2	2	1		3	1			1	13
	W.F.																			
	B.M.										3	1		1						5
	B.F.																			
TOTAL				2		1					5	3	1	1	3	1			1	18
Begging On	W.M.																			
Street	W.F.																			
	B.M.																			
	B.F.															1				1
TOTAL																1				1
Viol. Liquor	W.M.				1		1						2		1	1	1			7
Law	W.F.																			
	B.M.		1	1			1	1		1	4	3	3	3	5	1	2		2	28
	B.F.							1			2			1		1	1			6
TOTAL			1	1	1		2	2		1	6	3	5	4	6	3	4		2	41

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Visiting Illegal Drinking Place	W.M.																			
	W.F.																			
	B.M.			1		1		1		1	2	5	3	3	1			3		21
	B.F.										1	2	2	2		2	1			10
TOTAL				1		1		1		1	3	7	5	5	1	2	1	3		31
Visiting Disorderly House	W.M.																			
	W.F.																			
	B.M.																			
	B.F.						1			1		1								3
TOTAL							1			1		1								3
Refusing to Pay Licensed House	W.M.										1			1						2
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL											1			1						2
Viol. Lottery Law	W.M.																			
	W.F.																			
	B.M.																			
	B.F.												1					1		2
TOTAL													1					1		2
Affray	W.M.			1		3	1	1	1			1								8
	W.F.																			
	B.M.												1							1
	B.F.								1		1	1		1	1					5
TOTAL				1		3	1	1	2		1	2	1	1	1					14
Trespassing after Warning	W.M.														1		1			2
	W.F.																			
	B.M.											1								1
	B.F.																			
TOTAL												1			1		1			3

TRAFFIC CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Driving Car	W.M.	1		2	4	1	4	2	3	7	15	20	24	14	16	7	9	4	5	138
While Intoxicated	W.F.										1		2	2	4	1	1			11
	B.M.	1	2	1		3	2	1	1	2	15	12	12	11	15	14	4	2	3	101
	B.F.																			
TOTAL		2	2	3	4	4	6	3	4	9	31	32	38	27	35	22	14	6	8	250
Reckless Driving	W.M.		4	1	7		1	1		1	8	3	2	1	3		1			33
	W.F.																			
	B.M.	1	1	2	2		1	2	2			1	4	4	2	2			1	25
	B.F.								1											1
TOTAL		1	5	3	9		2	3	3	1	8	4	6	5	5	2	1		1	59
No State	W.M.	1	1	1	1	2		1		1	3		1			1				11
Drivers License	W.F.																			
	B.M.		2	4		5	1	3	2	2	2	4	5	1	3	3	2		1	40
	B.F.			2				1												3
TOTAL		1	3	7	1	7	1	5	2	3	5	4	6	1	3	4	2		1	56
Speeding	W.M.			1				1			1			1						3
	W.F.																			
	B.M.			1					1		3	1		1	1					8
	B.F.																			
TOTAL				2				1	1		4	1		1	1					11
Allowing	W.M.						1		1			1								3
Unauthorized	W.F.																			
Person to Drive	B.M.			1								1	4	3						9
	B.F.																			
TOTAL				1			1		1			2	4	3						12
Motor & Traffic	W.M.					1														1
Viola.	W.F.							1												
	B.M.							1			2		1		1					5
	B.F.																			
TOTAL						1		1			2		1		1					6

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Possession of	W.M.										1	1	1	1	1					5
Car While	W.F.																		1	1
Intoxicated	B.M.												1							1
	B.F.											1								
TOTAL											1	2	2	1	1					7
Failing to	W.M.		3	1								1		1						6
Report an	W.F.																			
Accident	B.M.				1				3		2	3								9
	B.F.																			
TOTAL			3	1		1			3		2	4		1						15
Driving While	W.M.																			
Under Suspension	W.F.																			
	B.M.																1			1
	B.F.																			
TOTAL																	1			1
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				

Prison - 1

DEL. TO SHERIFF CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Assault with	W.M.																			
Intent to	W.F.																			
Murder	B.M.		1	1	1	1						1		1	1					7
	B.F.							2						1		1				4
TOTAL			1	1	1	1		2				1		2	1	1				11
Burglary	W.M.											1		1						2
	W.F.																			
	B.M.		1	1	1								1							4
	B.F.																			
TOTAL			1	1	1							1	1	1						6
Burglary and	W.M.			1	2		1													4
Grand Larceny	W.F.																			
	B.M.		1	2	4	2		1	1		2	1	1					1		16
	B.F.								1		1									2
TOTAL			1	3	6	2	1	1	2		3	1	1					1		22
Grand Larceny	W.M.		1		1		1			1	1									5
	W.F.																			
	B.M.	2	4				1	1		1	2	1	1					1		14
	B.F.							1												1
TOTAL		2	5		1		2	2		2	3	1	1					1		20
Grand Larceny of	W.M.	1		1	2				1		2	2	1							10
Auto	W.F.																			
	B.M.	1	2	1	2						1									7
	B.F.																			
TOTAL		2	2	2	4				1		3	2	1							17
Murder	W.M.																			
	W.F.																			
	B.M.																			
	B.F.												1							1
TOTAL													1							1

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Rape	W.M.				1															1
	W.F.																			
	B.M.	1																		1
	B.F.																			
TOTAL		1			1															2
Robbery	W.M.																			
	W.F.																			
	B.M.		1																1	1
	B.F.																			
TOTAL			1																	1
Forgery	W.M.													1						1
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL														1						1
Nighttime	W.M.										2									2
Burglary of	W.F.																			
Inhabited	B.M.						2				2	1								5
Dwelling	B.F.																			
TOTAL							2				4	1								7
Viol. Narcotic	W.M.										2									2
Law	W.F.										1									1
	B.M.			1	1	1					1		1	1						6
	B.F.																			
TOTAL				1	1	1					4		1	1						9
Demented	W.M.										1									1
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL											1									1

Prison-1

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Assault &	W.M.													1						1
Battery	W.F.																			
	B.M.																			
	B.F.																			
TOTAL														1						1
Probation Viol.	W.M.						1							1						2
	W.F.																			
	B.M.			1		1														2
	B.F.																			
TOTAL				1		1	1							1						4
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				

DEL. TO JUVENILE CHARGE	COLOR AND SEX	AGE GROUPS																		
		16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Contributing to	W.M.										1									1
Delinquency of	W.F.											1								1
Minor Child	B.M.										1									1
	B.F.											1								1
TOTAL											2	2								4
Desertion &	W.M.												1							1
Non Support	W.F.																			
	B.M.																			
	B.F.																			
TOTAL													1							1
Grand Larceny of	W.M.																			
Auto	W.F.																			
	B.M.	1																		1
	B.F.																			
TOTAL		1																		1
Breach of Peace	W.M.														1					1
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL															1					1
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				

Del. to U.S. Marsh. CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Possession of Counterfiet Money	W.M.										2									2
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL											2									2
Grand Larceny of Auto	W.M.						1													1
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL							1													1
Buying, Receiving & Concealing Stolen Property	W.M.															1				1
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																1				1
Theft of Interstate Shipment	W.M.																			
	W.F.																			
	B.M.											1	1							2
	B.F.																			
TOTAL												1	1							2
Grand Larceny	W.M.																			
	W.F.																			
	B.M.			1																1
	B.F.																			
TOTAL				1																1
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				

Prisons-1

DEL. TO MILITARY CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
AWOL	W.M.			2	4															6
	W.F.																			
	B.M.			2	1															3
	B.F.																			
TOTAL			0	4	5															9
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				

Prison - 1

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65+	TOTAL
Misdemeanors	W.M.	6	15	19	12	14	9	5	7	12	40	42	48	78	78	50	47	20	22	524
	W.F.			1			2	1	1	3	2	9	8	8	7	4				46
	B.M.	8	16	28	18	14	24	22	15	14	78	94	93	83	82	55	33	22	17	716
	B.F.		1	3	2	4	6	2	3	2	10	20	15	13	12	12	11	1	1	118
TOTAL		14	32	51	32	32	41	30	26	31	130	165	164	182	179	121	91	43	40	1404
Traffic Viol.	W.M.	5	6	5	12	4	6	5	4	9	28	26	28	17	20	8	16	4	5	202
	W.F.										1		2	2	4	1	1			11
	B.M.	2	5	9	3	8	4	7	9	4	24	22	27	20	22	19	7	2	5	199
	B.F.			2				1	1			1								5
TOTAL		7	11	16	15	12	10	13	14	13	53	49	57	39	46	28	18	6	10	417
Del. to Sheriff	W.M.	1	1	2	6		3		1	1	8	3	1	4						31
	W.F.										1									1
	B.M.	4	10	7	9	5	3	2	1	1	8	4	4	2	1			2		63
	B.F.							3	1		1		1	1		1				8
TOTAL		5	11	9	15	5	6	5	6	2	18	7	6	7	1	1		2		103
Del. to Juvenile	W.M.										1		1		1					3
	W.F.											1								1
	B.M.	1									1									2
	B.F.											1								1
TOTAL		1									2	2	1		1					7
Del. to U.S. Marshall	W.M.						1				2					1				4
	W.F.																			
	B.M.			1								1	1							3
	B.F.																			
TOTAL				1			1				2	1	1			1				7
Del. to Military	W.M.			2	4															6
	W.F.																			
	B.M.			2	1															3
	B.F.																			
TOTAL				4	5															9

Prison-1

CHARGE	COLOR AND SEX	AGE GROUPS 16	17	18	19	20	21	22	23	24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65 +	TOTAL
Investigated &	W.M.	1	1		2						3	4		1						12
Released	W.F.			1		1								1						3
	B.M.	5	7	7	2	3	1	2	6		10	5	3	4	1					56
	B.F.				1								1					1		3
TOTAL		6	8	8	5	4	1	2	6		13	9	4	6	1			1		74
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				
	W.M.																			
	W.F.																			
	B.M.																			
	B.F.																			
TOTAL																				

There were 635 subjects fingerprinted at the Avenue F Prison, which is an average of 20½ subjects per day.

The following is a report of films developed and printed at the Avenue F Prison photographic laboratory:

	FILMS	PRINTS
Identification Photos	750	1457
Wreck Pictures	19	0
Homicide	17	11
Latent Prints	21	11
Safe Burglaries	133	314
Miscellaneous	-	2
TOTAL	940	1795

The following is a report of blood tests given at the Avenue F Prison:

W. M.	88
W. F.	5
B. M.	156
B. F.	15
TOTAL	264

The following is a report of sobriety tests given at the Avenue F Prison:

Over 0.150		Under 0.150	
W. M.	19	W. M.	62
W. F.	0	W. F.	4
B: M.	17	B. M.	25
B. F.	0	B. F.	0
TOTAL	36	TOTAL	91

Refused to take test:		Unable to take test:	
W. M.	8	W. M.	3
W. F.	1	W. F.	0
B. M.	3	B. M.	1
B. F.	0	B. F.	0
TOTAL	12	TOTAL	4

TOTAL NUMBER OF TESTS GIVEN: _____

There were 33,464 meals served at the Avenue F Prison at a cost of $ 8,871.58 which is an average of 26.5 cents per meal.

(S) R. K. Curtis
SUPERINTENDENT OF PRISONS

[fol. 133]

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PAGE

[fol. 134]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 2350-N

[Title omitted]

ORDER CONTINUING TRIAL—August 23, 1966

It is Ordered that the hearing in the above-styled cause heretofore set to commence at 10 a.m., Monday, October 2, 1966, be and the same is hereby continued until 10 a.m., Tuesday, November 29, 1966.

It is further Ordered that the parties file with this Court on or before November 1, 1966, briefs on the legal questions involved.

Done, this the 23rd day of August, 1966.

Frank M. Johnson, Jr., Chief Judge.

[File endorsement omitted]

[fol. 135]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 2350-N

[Title omitted]

ORDER ON PRETRIAL HEARING—November 22, 1966

This cause coming on to be heard on a pretrial hearing on November 21, 1966, and all parties being represented by counsel, the following action was thereupon taken:

I. The following pleadings were allowed:

[File endorsement omitted]

Complaint and answer of each defendant.

II. It was agreed by all the parties that the following are the issues in controversy to be submitted in the manner indicated below:

A. Preliminary issues to be submitted by deposition and by brief *prior* to the hearing set for 10 a.m., November 29, 1966:

1. Whether any of the plaintiffs now have standing to attack the constitutionality of the various State statutes set forth in the complaint relating to the segregation, based on race, of the *city, county* and *town* penal facilities.

2. Assuming plaintiffs prevail on the above issue, whether plaintiffs may prosecute this action as a class action under Rule 23(a), Federal Rules of Civil Procedure, against all sheriffs and wardens in the State of Alabama, with defendant A. Melvin Bailey, Sheriff of Jefferson [fol. 136] County, Alabama, and Robert K. Austin, Warden of the City Jail of Birmingham, Alabama, as representatives thereof, and if the above defendants are not proper representative parties, whether venue is properly laid as to each.

B. In addition to the preliminary issues as above outlined:

1. Whether the various statutes set out in the complaint relating to the segregation, based on race, of penal facilities throughout the State of Alabama at all levels of government (unless modified by the Court in its determination of the preliminary issues above) are unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States.

2. Whether such statutes are unconstitutional as violative of the cruel and unusual provision of the Eighth Amendment to the Constitution of the United States.

3. Assuming plaintiffs prevail on either of the above issues, under what circumstances is the segregation of the races in penal facilities justified by considerations of prison security, discipline and safety, or, stated in somewhat different terms, what is the proper scope of a prison official's discretion in determining that the races should be segregated as a matter of prison security, discipline and safety.

III. It was stipulated and agreed by counsel in this cause that plaintiffs' third cause of action, alleging discrimination based on race in the employment practices at penal facilities throughout the State of Alabama, be deleted or struck from the lawsuit.

It is Ordered that all of the above allowances and agreements be and the same are hereby binding upon all parties in the above-styled cause.

Done, this the 22nd day of November, 1966.

Frank M. Johnson, Jr., Chief Judge.

[fol. 137]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
Civil Action No. 2350-N

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of WILLIE ALLEN, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of CECIL McCARGO, JR., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN, and THOMAS E. HOUCK, JR., for themselves, jointly and severally, and for all others similarly situated, Plaintiffs,

vs.

FRANK LEE as Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, as members of the Board of Corrections of Alabama; A. MELVIN BAILEY, as Sheriff of Jefferson County, Alabama and all other sheriffs of Alabama, jointly and severally, who are similarly situated; ROBERT K. AUSTIN as Warden of the City Jail of Birmingham, Alabama, and all other wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated, Defendants.

Before Rives, Circuit Judge, and Lynne and Johnson, District Judges.

Johnson, District Judge:

[File endorsement omitted]

ORDER JUDGMENT AND DECREE OF THREE-JUDGE PANEL —December 12, 1966

This is an action for declaratory and injunctive relief instituted by one white and five Negro citizens on their own behalf and on behalf of other persons similarly situated, pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. The plaintiffs seek a declaration concerning the rights of Negro citizens, male and female, not to be segregated, classified, designated, or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. Further, plaintiffs assert that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. [fol. 138] Plaintiffs ask that said statutes be declared unconstitutional and that the defendants be enjoined from requiring segregation by race in any of the state, county and city penal institutions in the State of Alabama.

Of the Negro plaintiffs, Caliph Washington is confined in the Jefferson County Jail, Jefferson County, Alabama, awaiting retrial on a capital charge; Johnnie Coleman, Willie Allen and Cecil McCargo, Jr., are confined in state penal institutions, and prior to their present incarceration had been confined under racially segregated circumstances in either city, town or county jails in Alabama; and Hosea L. Williams and Thomas E. Houck, Jr., were incarcerated in the Birmingham City Jail at the time this case was instituted.

The defendant Frank Lee is Commissioner of the Board of Corrections of the State of Alabama and as such is invested with the authority and charged with the duty of serving as the chief administrative officer of the Alabama Board of Corrections. Title 45, § 10(5), Code of Alabama,

Recompiled 1958. The defendant A. Melvin Bailey is the duly elected and qualified sheriff of Jefferson County, Alabama, and as such has the legal custody and charge of the Jefferson County Jail and all prisoners committed thereto. Title 45, § 115, Code of Alabama, Recompiled 1958. The defendant Robert K. Austin is warden of the City Jail of Birmingham, Alabama, and in this capacity has the custodial duty and authority over prisoners in that jail. The defendants Bailey and Austin are sued individually and as representatives of all county sheriffs of Alabama and of all wardens and jailers of the city and town jails of Alabama.[1]

I.

As noted in the complaint filed with the Clerk of this Court on February 18, 1966, plaintiffs Williams and Houck allege that they were then incarcerated in the City Jail of Birmingham, Alabama. It now appears, however, that the charges against Houck have been nol prossed and that Williams has entered a plea of guilty to the charges against him and has paid the fine imposed upon said plea. For these reasons, the defendants Austin and Bailey contend that plaintiffs have no standing to challenge any of the [fol. 139] statutes or practices requiring segregation or relating to the segregation by race of the penal facilities of the City of Birmingham or Jefferson County. In *Singleton v. Board of Commissioners,* 356 F. 2d 771 (5th Cir. 1966), this same issue was raised in that the plaintiff had completed the actual service of his sentence. In *Singleton,* the Court set forth the general principle applicable in such instances:

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[1] In the complaint as originally filed, plaintiffs also named as defendants the individual members of the Board of Corrections of Alabama and asked that said defendants be enjoined from excluding Negroes from employment, or otherwise discriminating against Negroes in their efforts to secure employment with the Alabama prison authorities. Upon a pretrial hearing of this cause, and by agreement of counsel, this phase of the lawsuit was stricken.

> The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use.

There is no question but that the evidence in this case reflects a "past use" of the penal facilities of the City of Birmingham and Jefferson County by some of these plaintiffs. As to that part of the general rule stated in *Singleton* concerning the "reasonable possibility of future use," this Court does not conceive that it is necessary that plaintiffs show an intention to violate the laws of the State of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell* v. *United States,* 313 U.S. 80. Under the circumstances reflected by the evidence in this case, all that it is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail and the Jefferson County Jail is that the operation of these institutions, as that operation presently exists, "permit[s] the recurrence of comparable violations." *Henderson* v. *United States,* 339 U.S. 816. In this regard, the Supreme Court of the United States in *Barrows* v. *Jackson,* 346 U.S. 249, observed that the rule against relying on the constitutional rights of another (who may be in this case presently imprisoned in either the penal facility of the City of Birmingham or of Jefferson County) is not part of the constitutional requirement of standing, but is a rule of self-restraint which the court has developed for its own governance, and, for that reason, is a mere rule of practice not to be applied where it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of competent jurisdiction.[2] See also *Ferguson*

[2] In this connection, defendant Austin testified that the average length of time prisoners are incarcerated in the Birmingham City

v. *Buchanan*, No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965, where the criminal prosecution against the plaintiff, who was seeking to enjoin the sheriff of Dade County, [fol. 140] Florida, from maintaining segregated facilities in the jails of Dade County, was nol prossed before the case was submitted to the district court. That court, nevertheless, found the Florida statutes that required segregation in county jails on the basis of race unconstitutional, and enjoined the defendants from operating or maintaining jails in a manner requiring segregation of the races. For these reasons, it is evident that the contention on the part of defendants Austin and Bailey that these plaintiffs do not have standing to challenge the statutes and practices requiring segregation of the races in the penal facilities of the City of Birmingham and Jefferson County is not well taken.

II.

As to the contention of the defendants Austin and Bailey that they are not representative defendants of other wardens, jailers and sheriffs in the State of Alabama and, therefore, that these plaintiffs cannot maintain this action through them as representatives of "the class" within the meaning of Rule 23, Federal Rules of Civil Procedure, this Court concludes to the contrary. While it may be that the physical facilities of Jefferson County and the City of Birmingham are more elaborate and their operations more complex than many of the other jails in Alabama, this, without more, cannot serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. See *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962). It would be extremely

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Jail is from seven to fifteen days. Under such circumstances, it would be impossible for a prisoner to file and secure an adjudication on his case before he was released.

difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent—a requirement which, as indicated, is satisfied in this case—then it becomes immaterial whether certain of these class defendants are not otherwise identically situated. 3 Moore, Federal Practice, ¶ 23.10 at 3454 (2d Ed. 1963). See *Harris* v. *Palm Springs Alpine Estates, Inc.*, supra (citing cases).[3]

[fol. 141] The only defense offered to the contention that the statutes involved herein[4] violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts. We disagree. Since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated. As stated by the Fifth Circuit in *Singleton* v. *Board of Commissioners*, supra:

> Twelve years ago, in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, the Supreme Court effec-

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[3] On this point this Court has serious misgivings as to the right of either the defendant Austin or the defendant Bailey to raise this particular question in this case. It appears that such a defense would, if valid, enure only to the benefit of other members of "the class" that these defendants are alleged to represent. The contention on the part of these defendants that, if they are not proper representatives of the other members of the class, venue in this district is improper as to them without legal basis. Title 28, § 1329(a), United States Code.

[4] The Alabama statutes that require segregation of the races in the prisons and jails of Alabama are §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

tively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the State. "[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities." Johnson v. Virginia, 1963, 373 U.S. 61, 62. 356 F. 2d at 772.

Although it is true that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system,"[5] it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law. *Cooper* v. *Pate*, 378 U.S. 546 (1965); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Sewell* v. *Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D.C. Cir. 1961). In this regard, this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in [fol. 142] some isolated instances[6] prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the

[5] *Price* v. *Johnston*, 334 U.S. 266 (1948).

[6] For example, the "tank" used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober. According to the evidence in this case, the population of the "tank" on Saturday nights in the Birmingham jail reaches fifty or more.

races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Plaintiffs' contention that the separation of prisoners solely on the basis of race constitutes a violation of the "Cruel and Unusual" Punishment Clause of the Eighth Amendment to the Constitution of the United States is plainly without merit. There is no question but that, through the action of the Fourteenth Amendment, the Eighth applies to the states, *Robinson* v. *California*, 370 U.S. 660 (1962). However, the Cruel and Unusual Punishment Clause of the Eighth Amendment was adopted to prevent inhuman, barbarous or torturous punishment, *Black* v. *United States*, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U.S. 938 (1960); *Hemans* v. *United States*, 163 F. 2d 228 (6th Cir.), cert. denied, 332 U.S. 801 (1947); and segregation of individuals, while incarcerated, solely by reason of their race does not, in the opinion of this Court, constitute cruel and unusual punishment.

IV.

The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel, such as Frank Lee as Commissioner of the Board of Corrections for the State of Alabama and A. Melvin Bailey as sheriff of Jefferson County, Alabama, deserves the most careful consideration of this Court. In this connection, it is recognized that "[t]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings," *Edwards* v. *Sard*, 250 F. Supp. 977 (D.C. Dist. 1966), and in light of this recognition this Court will not at this time require an immediate and total desegregation of state, county and city penal facilities in the State of Alabama. However, the several honor farms, the educational programs, the youth centers and the hospitals in the state system must

be completely desegregated immediately. All facilities in the minimum and medium security institutions, including Draper Correctional Center and Julia Tutwiler Prison for Women, must be completely desegregated within six months. As to the maximum security institutions, such as Kilby Prison and Atmore Prison, the evidence reflects that [fol. 143] considerations of security and discipline require a more gradual desegregation. In this connection, the Court will expect complete and total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year. As to the county and city systems, complete desegregation should be achieved within six months in all areas, including quarters, except in very exceptional instances as, for example, in the use of the "tank" mentioned previously.

No plan of desegregation will be required of any of these defendants. However, since it is the function and duty of the Board of Corrections for the State of Alabama, and particularly the Commissioner thereof, pursuant to §§ 3, 7, 10(1), 10(5), 10(8) and 11, to inspect and generally supervise every county and municipal jail or prison in any incorporated town and city in the State of Alabama having ten thousand or more population, this Court will require the Commissioner of the Board of Corrections to supervise not only the desegregation of state penal facilities as herein ordered, but also the desegregation of the jails in the counties throughout the State of Alabama and in all towns and cities throughout the state. The Commissioner of the Board of Corrections will be required to report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and the county and city jails, and other penal facilities throughout the State of Alabama.

In view of the declarations herein made concerning the unconstitutionality of the state statutes in question to the extent that those statutes require segregation of the races solely by reason of their color, and with the further declarations as to the unconstitutionality of the practice of

segregating prisoners in any of the state, county or city penal facilities solely by reason of race, and the declarations concerning the duty of appropriate officials to take the necessary steps within the periods herein indicated, this Court does not consider it necessary to issue a formal injunction in this case at this particular time. However, there should be no misunderstanding on the part of any of the officials involved concerning the duty imposed upon them by the law generally and by this order specifically to cease the practice of arbitrarily segregating the races in the state, county and city penal facilities. The officials of the State of Alabama, whether they be concerned with the state penal facilities or the county and city penal facilities, [fol. 144] have an affirmative duty and responsibility to effect desegregation of these facilities in accordance with this decree. Jurisdiction of the case will be specifically retained for all purposes.

It is, therefore, the Order, Judgment and Decree of this Court that §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, be and are, in each instance, declared violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama.

It is further Ordered that the defendant Frank Lee as Commissioner of the Board of Corrections for the State of Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum

security institutions, within a period of one year from the date of this decree.

It is further Ordered that the defendant A. Melvin Bailey as sheriff of Jefferson County, Alabama, and each sheriff of each county in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the county jails and any other penal facilities and operations that may be maintained by any such county, within a period of six months from the date of this decree.

It is further Ordered that the defendant Robert K. Austin as warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree.

It is further Ordered that the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March [fol. 145] 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama.

It is further Ordered that each sheriff and each warden in the counties, cities and towns in the State of Alabama furnish the Commissioner of the Board of Corrections for the State of Alabama such reports and information that may be required by said Commissioner in the discharge of his duty to report to this Court.

It is further Ordered that the costs incurred in this proceeding be and they are hereby taxed against the de-

fendants, but the Court is of the opinion that the State of Alabama should pay the costs for the defendants.

Done, this the 12th day of December, 1966.

Richard T. Rives, United States Circuit Judge, Seybourn H. Lynne, United States District Judge, Frank M. Johnson, Jr., United States District Judge.

[fol. 146]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 2350-N

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 6, 1967

A

I. Notice is hereby given that the defendants Frank Lee as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as members of the Board of Corrections of Alabama, above named, hereby appeal to the Supreme Court of the United States from the final order entered in this case on December 12, 1966.

II. This appeal is taken pursuant to 28 U.S.C. §1253.

B

I. The Clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States, and include in said

[File endorsement omitted]

transcript all pleadings, motions and orders including, but not limited to, the following:

[fol. 147]

(1) Complaint filed February 18, 1966.

(2) Motion for Preliminary Injunction filed February 18, 1966.

(3) Motion to Dismiss filed March 4, 1966.

(4) Order appointing three-judge court filed March 22, 1966.

(5) Motion to Amend Complaint filed April 2, 1966.

(6) Order granting Amendment to Complaint filed April 5, 1966.

(7) Order carrying Motions to Dismiss with the case filed June 8, 1966.

(8) Interrogatories to defendant Frank Lee filed June 9, 1966.

(9) Order setting case for Trial on Merits filed June 13, 1966.

(10) Answer of above-named defendants filed June 14, 1966.

(11) Defendant Frank Lee's Answer to Plaintiffs' Interrogatories filed June 14, 1966.

(12) Order continuing hearing on the merits to November 29, 1966, filed August 23, 1966.

(13) Order on pretrial hearing filed November 22, 1966.

(14) Order of Rives, Circuit Judge, and Lynne and Johnson, District Judges, entered December 12, 1966.

(15) All pleadings, answers, motions to dismiss, and interrogatories of all parties to the cause in order to present a complete record, including all exhibits.

(16) Complete transcript of all evidence of all parties introduced in the case.

C

I. The following questions are presented by this appeal:

[fol. 148]

(1) Do state statutes which require the separation of white and Negro prisoners in state penal institutions and county and city jails violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

(2) Does a prisoner serving a penitentiary sentence have the constitutional right to question the validity of state statutes requiring the separation of prisoners by race?

(3) Does the District Court have jurisdiction and authority to require the defendant Commissioner of Corrections of Alabama to supervise the desegregation of all penal state facilities, including cities of under ten thousand population where state statutes invest authority in the said Commissioner only as to cities over ten thousand population?

(4) Are §§4, 52, 121, 123, 172, and 183 of Title 45, Code of Alabama, Recompiled 1958, violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require the segregation of the races in the prisons and jails of Alabama?

(5) Does the District Court have authority to order the defendant Frank Lee as Commissioner of the Board of Corrections to make reports to the court every three months, beginning March 15, 1967, as to the steps taken and progress made to eliminate segregation in the state penal institutions and the county and city jails in the State of Alabama?

[fol. 149] MacDonald Gallion, As Attorney General of the State of Alabama; Gordon Madison, As Assistant Attorney General of the State of Alabama, Attorneys for above-named Defendants.

Certificate of Service (omitted in printing).

[fol. 150]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 2350-N

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 8, 1967

A

1. Notice is hereby given that the defendant, Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, in the above styled cause hereby appeals to the Supreme Court of the United States from the final order entered in this case on December 12, 1966.

II. This appeal is taken pursuant to 28 U.S.C. § 1253.

B

I. The Clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all pleadings, motions and orders including, but not limited to, the following:

1. Complaint filed February 18, 1966.

[File endorsement omitted]

2. Motion for Preliminary Injunction filed February 18, 1966.

[fol. 151] 3. Motion of defendant, Robert K. Austin, to dismiss filed April 25, 1966.

4. Order appointing three-judge Court filed March 22, 1966.

5. Motion to Amend Complaint filed April 2, 1966.

6. Order granting amendment to complaint filed April 5, 1966.

7. Order carrying motions to dismiss with case filed June 8, 1966.

8. Interrogatories to Defendant, Robert K. Austin, filed June 9, 1966.

9. Order setting case for trial on merits filed June 13, 1966.

10. Answer of Defendant, Robert K. Austin, filed June 17, 1966.

11. Answer of Robert K. Austin to Plaintiffs' Interrogatories filed June 25, 1966.

12. Order continuing case on merits to November 29, 1966, filed August 23, 1966.

13. Order on pretrial hearing filed November 22, 1966.

14. Order of Rives, Circuit Judge, and Lynne and Johnson, District Judges, entered December 12, 1966.

15. All pleadings, answers, motions to dismiss, and interrogatories of all parties to the cause in order to permit a complete record, including all exhibits.

16. Complete transcript of all evidence of all parties introduced in the case.

17. This notice of appeal.

II. If permitted under Rules of Court, it is requested that the transcript of the Record be prepared in connection with other appeals heretofore or hereafter taken in this case so as to include items set out in I above, but eliminate duplications and thereby reduce expense, as provided by Rule 74 of Federal Rules of Civil Procedure, but if such is not permissible, please prepare transcript in accordance with I above.

C

I. The following questions are presented by this appeal:

(1) Do state statutes which require the separation of white and Negro prisoners in state penal institutions and county and city jails violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

[fol. 152] (2) Are §§ 4, 52, 121, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require the segregation of the races in the prisons and jails of Alabama?

(3) Do the plaintiffs in this case have standing to challenge any of the statutes or practices requiring segregation or relating to the segregation by race of the penal facilities of the City of Birmingham?

(4) Is the defendant, Austin, representative of other wardens and jailers of city and town jails of Alabama to the extent that plaintiffs may maintain this action through said Austin as representative of "the class" within the meaning of Rule 23, Federal Rules of Civil Procedure?

J. M. Breckenridge, Earl McBee, Attorneys for Defendant, Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, 600 City Hall, Birmingham, Alabama 35203.

Certificate of Service (omitted in printing).

[fol. 153]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 2350-N

[Title omitted]

MOTION FOR STAY PENDING APPEAL—
Filed February 14, 1967

Now come Frank Lee as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as members of the Board of Corrections of Alabama, and respectfully move the Court for a Stay of the Order, Judgment, and Decree of the Court entered on the 12th day of December, 1966, and as grounds therefor assign the following:

That the above named defendants have filed Notice of Appeal to the Supreme Court of the United States on the Judgment and Decree of the Court entered on December 12, 1966; that said Judgment or Decree ordered immediate desegregation of certain prison facilities and others to be desegregated within six months and still others to be desegregated within twelve months; that said Appeal involves questions which have not been specifically decided as to prisoners by either the Fifth Circuit Court of Appeals or the Supreme Court of the United States; that the questions presented on appeal are substantial and no appreciable injury will result to plaintiffs by staying the Judgment pending a decision by the Supreme Court of the United States.

MacDonald Gallion, As Attorney General of Alabama; Gordon Madison, as Assistant Attorney General of Alabama, Attorneys for above named defendants.

[File endorsement omitted]

[fol. 154] Certificate of Service (omitted in printing).

[fol. 155]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 2350-N

[Title omitted]

ORDER DENYING MOTION FOR STAY—February 15, 1967

The defendants' motion for a stay of the order of this Court made and entered herein on December 12, 1966, pending an appeal of this cause to the Supreme Court of the United States, is now presented.

Upon consideration of said motion, it is the Order and Judgment of this Court that the motion for a stay pending appeal be and the same is hereby denied, except it is Ordered that the judgment of this Court made and entered herein on December 12, 1966, be and the same is hereby stayed for a period of twenty days so as to enable the defendants, if they desire, to present to the Supreme Court of the United States their motion for stay pending appeal.

This order is entered by and with the express consent of each of the judges designated to hear and determine this action.

Done, this the 15th day of February, 1967.

Frank M. Johnson, Jr., Chief Judge.

[File endorsement omitted]

[fol. 156] [File endorsement omitted]

[fol. 159]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2350-N

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of WILLIE ALLEN, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of CECIL MCCARGO, JR., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN, and THOMAS E. HOUCK, JR., for themselves, jointly and severally, and for all others similarly situated

v.

FRANK LEE, as Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as members of the Board of Corrections of Alabama; A. MELVIN BAILEY, as Sheriff of Jefferson County, Alabama, and all other sheriffs of Alabama, jointly and severally, who are similarly situated; ROBERT K. AUSTIN as Warden of the City Jail of Birmingham, Alabama, and all other wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated.

Before: Hon. Richard T. Rives, United States Circuit Judge; Hon. Seybourn H. Lynne, United States District Judge; and Hon. Frank M. Johnson, Jr., United States District Judge.

At: Montgomery, Alabama.

Transcript of Proceedings—November 29, 1966

[fol. 160] APPEARANCES:

For the Plaintiffs: Charles Morgan, Jr., M. Laughlin McDonald, and Orzell Billingsley, Jr.

For Frank Lee and members of Board of Corrections: Gordon Madison.

For Sheriff Bailey: Dominick, Fletcher & Yeilding (Frank Dominick and Walter Fletcher).

For Warden Austin: J. M. Breckenridge and Earl McBee.

(The above-styled case coming on for trial at Montgomery, Alabama, November 29, 1966, before the above-constituted Court, the following proceedings were had:)

Judge Rives: Gentlemen, we call the case of Caliph Washington and others against Frank Lee as Commissioner of Corrections of Alabama and others. Have counsel already noted their appearances?

Mr. Morgan: Yes, sir; we have.

Judge Rives: And do the plaintiffs have any evidence to offer?

Mr. Morgan: Yes, sir; we do. We have one witness, and we have a matter that I think they will recognize, and I think that the City of Birmingham has some documents, themselves, they want to introduce into evidence. Then we have the interrogatories to three parties and the answers from three parties, and I would move the admission of the interrogatories into—and the admission of the answers to [fol. 161] interrogatories to Messrs. Austin, Bailey, and Lee at this time, if I might.

Judge Rives: Very well; unless there is some objection, those will be admitted. And unless there is some further preliminary matter, why, the plaintiffs may proceed.

Mr. Breckenridge: Your honor, we have certificates from the Circuit Court in Birmingham showing that two of

the party complainants pled guilty, and that the action against them has been disposed of, and the other cases which were pending at the time of the guilty plea have been nol-prossed.

Judge Rives: Those were the certificates that we have already seen, I expect; aren't they?

Mr. Breckenridge: Hosea L. Williams and Thomas E. Houck, Jr.

Judge Rives: Yes, sir.

Mr. Breckenridge: Now, I believe I sent to Judge Johnson the—Judge Johnson a copy, as he suggested at pretrial hearing, the original of those documents—I do have another certified copy here.

Judge Johnson: They have been filed with the Clerk.

Judge Rives: They have been filed; we have examined them, and, at the appropriate time, those may be introduced in evidence.

Mr. Breckenridge: We do not want them introduced at this time.

Judge Rives: All right, sir.

[fol. 162] Mr. McBee: Your honor, we would like to have them introduced at this time.

Judge Rives: Well, I take it plaintiff will introduce its evidence first.

Mr. McBee: I understood that; you mean—oh.

Mr. Morgan: They have something of a preliminary nature.

Mr. McBee: At the proper time?

Judge Rives: Yes.

Mr. McBee: We will have a stipulation, your honor,—that this—that this—that the averments of paragraph one of the eighth defense are correct.

Judge Rives: All right.

Mr. McBee: They will stipulate that is correct.

Judge Rives: Yes; yes, sir. Very well, gentlemen, the plaintiffs may proceed.

Mr. Morgan: All right, sir. I want to call Mr. John Boone, and find me paragraph one of the eighth defense, please.

The Clerk: Hold up your right hand, please, sir. Do you solemnly swear the testimony you give in this cause to be the truth, the whole truth, and nothing but the truth, so help you, God?

Witness John O. Boone: I do.

Mr. Morgan: One moment, Mr. Boone. Your honor—

Mr. McBee: May we have the witness's name? I didn't [fol. 163] get it.

Mr. Morgan: John O. Boone, B double o-n-e. I note that the statement was made that we stipulated to paragraph one of the eighth defense, with regard to the records of the City of Birmingham; we would like to, of course, point out in that stipulation that those cases, guilty pleas were entered, fines were paid, or nol-prosses were entered after the date of filing of this suit.

Judge Rives: (Nodded to indicate affirmative reply.)

JOHN O. BOONE, witness for the Plaintiffs, having been duly sworn, testified as follows:

Direct examination.

By Mr. Morgan:

Q. What is your name?

A. John O. Boone.

Q. By whom are you employed, Mr. Boone?

A. Southern Regional Council.

Q. What is the Southern Regional Council, Mr. Boone?

A. It is a human relations agency located—headquarters is located in Atlanta, Georgia.

Q. Go ahead; pardon me; I am sorry.

A. Designed to promote better human relations in the Southern region.

Q. Mr. Boone, what is the nature of your work with that organization?

[fol. 164] A. The organization have a Ford Foundation grant to do whatever it can to support improvement of

procedures to cope with delinquency and crime in the Southern region and to improve the procedures of penal administration in the Southern region. It is a three-year project.

Q. Where did you go to school, Mr. Boone?

A. Morehouse College and Atlanta University.

Q. Did you receive degrees at those institutions?

A. I received an A.B. degree at Morehouse College and a Master of Social Work degree from Atlanta University.

Q. A Master of Social Work degree; were you employed after your—you graduated and received your Master's degree?

A. Yes, I was employed for approximately fourteen years at the Atlanta Federal Penitentiary. I started as a correctional officer or guard and proceeded through the ranks to Chief of Classification and Parole Unit, before I was transferred to the Penitentiary, Terre Haute, Indiana, as Chief of the Classification and Parole Unit.

Q. While at the Atlanta Penitentiary, did you have any experience with the desegregation of that penitentiary?

A. Yes; we desegregated in several different phases, in several aspects of the prison life, while I was there.

Q. Would you tell the Court how the Atlanta Penitentiary went about that?

A. My first experience was when—when I went on duty [fol. 165] there, the jobs were completely segregated. Negroes did only the janitorial jobs, and what have you, and the Classification and Parole Officer started encouraging Classification Committee to start assigning Negroes to jobs that they could—so that they could learn something and be helpful to them after they leave, and this is how we did that. We would present the case and say this man would make, for example, a good laundry worker or a good cook, and he should be assigned likewise, or this man has the ability to become a plumber. So that was the—how we got the jobs desegregated. A few years later, Warden looked around and said. "We should desegregate the Education Department." He called a meeting at his residence

of all of the staff members, administrative staff, education staff, classification people, and wondered if this would be feasible at this time. There were positives and negatives. Some felt that it was; some felt it wasn't. However, he said, "We have orders to do it, and we will do it." And the Education Department was desegregated without incident overnight. Later on, under the guidance of another Warden, he mentioned that perhaps we should desegregate the Admission and Orientation Unit, and he—it was a—he decided that this would be done, as a new man was admitted, that he would be assigned to quarters without regard to race. This was done without incident. Later we built a new dormitory, and at that time the Warden decided that we should desegregate all of the honor units, the dormitories and the honor farm and what have you. And [fol. 166] this was done, without incident. Then a few years later, we decided—the Warden decided that we should endeavor to desegregate the closed custody units; this is the large cell blocks. This was being done when I left. When I was transferred to Terre Haute Penitentiary, they were desegregating D cell house, and after I left, they desegregated the larger cell houses.

Q. Based upon your experience, your educational background, and your observation of desegregation in the Atlanta Federal Penitentiary, do you have an opinion as to whether or not any substantial problems will be met in a penal institution in the State of Alabama by racial desegregation of that institution?

A. No.

Mr. Madison: We object to that, if the Court please, as being applied to the penal institutions in the State of Alabama.

Judge Rives: Objection will be overruled.

Q. You can answer.

A. No, I don't.

Q. You do not have an opinion or you do have an opinion?

A. I don't think, properly managed, that they would have any difficulty at all.

Q. Fine. Now, are there any racial—has it been your experience—based upon your experience, your work experience, and your education, your educational background and your employment at both the Atlanta Federal Penitentiary and the Federal Penitentiary at Terre Haute, [fol. 167] Indiana, do you have an opinion regarding racial tensions existing within a prison, and whether or not they are greater under a system of racial segregation or under a system of integration?

A. I would think they were—they are greater under a system of racial segregation. You see, men in prison take advantage of any kind of weakness in any kind of social system in the prison, and this is one thing that they do, they—this has prevailed through the years, and they will agitate and do most anything; however, in an atmosphere of honesty and integrity, why, the morale is up, and we noticed an improvement in morale as we began to cope with the problem and integrate the other services.

Mr. Morgan: Thank you, Mr. Boone; that's all. These other gentlemen may have some questions for you.

Cross examination.

By Mr. Madison:

Q. You say the first desegregation took place—

Judge Rives: However you like. What were you asking, Mr. Madison? I didn't—I didn't understand you. However you and the reporter like it.

Q. You stated that the first desegregation took place with reference to jobs in the Atlanta prison system?

A. Yes, sir.

Q. And I believe you testified that—that some two years later you took up the educational part of the program in [fol. 168] penal—in the penal institutions; is that correct?

A. Some few years later we—

Q. Or few?

A. Few.

Q. Few; few years?

A. (Nodded to indicate affirmative reply)

Judge Rives: Mr. Madison, interrogate him, if you will, about what years he is talking about.

Q. Now, what—what years are you talking about; when did you first start the desegregation of the jobs?

A. I started in 1951, and the Education Department was desegregated in approximately 1954, about the time of the Supreme Court decision about education facilities.

Q. Then after that, you went into the educational part of the program at the institution, and that was desegregated?

A. Yes.

Q. And how long did it take?

A. Overnight.

Q. Overnight?

A. (Nodded to indicate affirmative reply)

Q. And then, I believe, you testified that a few years later you went into another part of the desegregation program at the prison?

A. Yes. This was the Admission and Orientation Unit. There is a separate building when we bring—when men—[fol. 169] when new men come in, they stay for a period of thirty days. It was decided that as these men are admitted, they should be assigned to quarters without regard to race.

Q. Is the prison system that you have testified about, is it completely desegregated now?

A. It is completely desegregated now.

Q. And how long did it take in all from the beginning in 1951 until the complete desegregation took place; how many years?

A. Well, let me—you say how long did it take; actually, let's say this, it was completed last year, but this is not meant to imply that it took that long.

Q. Well, you started in 1951—

A. (Nodded to indicate affirmative reply)

Q. —a desegregation program for the penal institutions in Atlanta; right; or in what?

A. At first we were thinking about the men. That is, I looked around, and Negroes weren't getting experience; they weren't preparing them to go back in the community, because they were assigned only to, let's say, janitorial jobs. Then the professional case workers started encouraging the Classification Committee to assign these men to jobs so they would be better prepared. Now, I don't think we were thinking about integration; in other words, getting them ready to go to the community was an overriding factor, not desegregation as such.

Q. Well, do you find in your work that there are different [fol. 170] types of prisoners, and some require certain type of treatment in penal institutions from others?

A. Yes; without regard to race, you have a small percentage, about—I don't—I won't say, but a very small percentage that need more control than others. Of course, this—

Q. Do you mean by that that there can be separation of Negroes from whites which will not be on the basis of race, but be for security or other reasons in the penal institutions?

A. No, I don't believe that; in fact, I have never found that that was necessary unless two men were fighting, and they could be two white men; we might separate them until they cool off and maybe decide to shake hands and not, you know, do battle again; but we wouldn't segregate—we haven't found it necessary to do anything like that.

Q. How would you think that one Negro prisoner, we will say, would fare among thirty or forty white prisoners with the same degree of conviction, we might say, or the same charges?

A. I think this would be related to the management; whether or not they were determined, whether or not the atmosphere was right, that the policy of the institution was equal treatment, you know, without regard to race, and I—I—I just don't see thirty men taking advantage of

this what you mean of [illegible] gro. It—it doesn't happen. In fact, we—we have in [illegible]t times had a Negro on a job wit[illegible] a predomin[illegible]ber of whites, and really [fol. 171] you have a [illegible]nant number of southerners in Atlanta Federal [illegible] and they accept it. In fact, these men in prison, [illegible]ners and northerners, serve time all over the country; they may serve in a segregated institution in Alabama and go right away, next sentence, to Massachusetts and serve in an integrated institution; so really, the administration leaving themselves open when they have a segregated system for the cunning men to take advantage of this weakness to cause disturbance and to take advantage of an opportunity to make it difficult for management.

Mr. Madison: I don't know exactly, I believe you qualified him as an expert; anyhow—

Mr. Morgan: (Nodded to indicate affirmative reply)

Mr. Madison: —I will ask him the question on that basis.

Q. In your opinion, do the officials of a penal system like the one we have here in Alabama, if you are familiar with it, do they have to have a wide latitude of discretion in the operation of that system?

A. Within certain limitations.

Q. What are the limitations?

A. I think that you—they should first give everybody equal protection under the law; they must have, I believe, the discretion to control men. In control situation, you have a lot of human beings together, stress and pressure, [fol. 172] where a man, without regard to race, may go berserk where you would have to protect the others and perhaps take that individual out and maybe isolate an individual.

Q. Assuming that the—that these statutes relating to the separation of races in prisons are struck down and that no longer there is any separation on the basis of race and color in those institutions, assuming that to exist,

would you say that the prison officials would have latitude and discretion in the operation of the prison system?

A. Yes, I—I think they would have the makings of improving the system.

Q. Do not instances occur in which decisions have to be made on the spot, so to speak, in the operation of a penal system? For instance, you said awhile ago two men—

A. This is true.

Q. —two men may get to fighting? Anything might arise that would require prison officials to make a decision right then and there about what would be the best thing to do?

A. Yes, that is true.

Mr. Madison: That's all.

By Mr. Breckenridge:

Q. Your—your experience—your experience has been entirely in the Federal system; is that correct? Prison system?

A. Yes, it has been.

Q. Now—and limited in that system to penitentiaries as [fol. 173] distinguished from town jails? Is that correct?

A. Yes; that's right.

Mr. Breckenridge: That's all.

Judge Rives: Anything further from the plaintiffs? Mr. Fletcher?

Judge Johnson: Mr. Fletcher.

By Mr. Fletcher:

Q. Mr. Boone, I understand you have no familiarity with Alabama jails or penal—?

A. Yes; I mean, I am acquainted with some of the prison officials, at least I have met them, and I have met some of your ex-inmates. In fact, I have encountered hundreds and hundreds of them in Federal Prison.

Q. Well, are you familiar with the jails?

A. And we have sent some over here; in fact, you have some of our men over here now that we have transferred to you, that is—we have cooperated fairly well together.

Q. Are you familiar with the prisons in Alabama, with Kilby?

A. Yes; prison is not that different. You see, actually, you might say that some prisons in the Southern region are under-developed, and I have been since—for the last six months have been practically over all the region talking to people who are interested.

Q. Tell me one Alabama prison with which you are familiar?

A. I haven't visited any Alabama prison as such.

[fol. 174] Q. You have not visited any Alabama prison?

A. No, but I have been in meetings with Alabama prison officials who talked about their system as such.

Q. You are not familiar with the Jefferson County Jails?

A. No.

Q. Never been in them?

A. No.

Q. Let me ask you if it is not a fact that the type prisoners that are usually found in the Federal penal institutions are different?

A. Sir?

Q. Are not the type prisoners usually found in Federal penal institutions different?

A. No, sir.

Q. Than those in State?

A. No, sir; they are the same men.

Q. Are the prisoners in Federal Prisons in for rape, burglary, murder, assault?

A. Yes, sir; yes, sir.

Q. Under Federal conviction of rape?

A. Certainly, we have had some in for rape.

Q. Well, is there not a higher ratio of prisoners in State penal systems that are convicted of crimes of violence rather than those who are in Federal Prisons having run afoul of some Federal law?

[fol. 175] A. Let's say I don't think so. I think you will find similar populations, I'll say—you see, in Alabama, you go out to your prison, no doubt about it, you will find men from all over the country in your prison, who have been in Federal Prison perhaps any number of times.

Q. This is only because an offender likely is a repeat?

A. That is right; that is because they do repeat; unfortunately, that is the big problem.

Q. Are there at times in all prisons when prisoners are —are and must of necessity be locked up entirely without supervision, for instance at night?

A. Oh, about—a small percentage, I would say about ten per cent of them. If you had as your Classification Officer—most of the men can be trusted, but a small number of them must be locked up.

Q. Excuse me, Mr. Boone; I am not asking you about can they be trusted, I am asking you are there times in all prisons when the prisoners must of necessity be locked up without supervision?

A. I will say there are times when they are locked up without supervision, but I don't think it is necessary for all of them; I say the small percentage of them.

Q. Is this true in Federal penal institutions?

A. In all—in all prisons.

Mr. Fletcher: That's all.

Judge Rives: Anything further from the defendants?

[fol. 176] Anything further from the plaintiffs?

Mr. Morgan: Yes, sir.

Redirect examination.

By Mr. Morgan:

Q. Mr. Boone, the first gentleman that examined you, Mr. Madison, posed a couple of questions to you as an expert, and I just want to clarify one thing. Do you feel that under any set of circumstances race is a relevant characteristic for the purposes of assignment of either work-living habits or dormitory space or otherwise in a penal institution?

A. Not at all.

Mr. Morgan: That's all.

Mr. Breckenridge: I have—

Judge Rives: Yes, sir.

Mr. Breckenridge: In view of that last question, I have a question to ask Mr. Boone.

Recross examination.

By Mr. Breckenridge:

Q. Are you—do you know Mr. Charles M. Rogers, Deputy Superintendent of Lorton Penitentiary?

A. No, I don't.

Q. Do you agree with the statement that he made that was reported in Edwards versus Sard, 250 Federal Supplement 977, that the race of prisoners is one factor in deciding which dormitory to assign them to; do you agree or disagree with that?

[fol. 177] Mr. Morgan: Object for just one point; I would like for the witness to be able to see the document from which Mr. Breckenridge is reading; he might just give it to him and let him familiarize himself with it.

Mr. Breckenridge: It is a copy from the Federal Reports.

Mr. Morgan: I thought it might be better for the witness to read what—the words you were referring to in there. You might point out—

Q. Mr. Boone, I was referring to this statement by the Court that Mr. Charles M. Rogers, Deputy Superintendent of Lorton—the Court says, "However, when examined whether he considered the race of prisoners as one factor in deciding which dormitory to assign them to, Mr. Rogers answered that he did." Now, all I want to know, do you agree or disagree with that statement?

A. Well, I disagree with Mr. Rogers.

Q. You disagree with that. Now, do you know Mr.—Mr. Sard, Edward Sard—Thomas R. Sard, Commissioner of Corrections for the District of Columbia—

A. No.

Q. —do you know him?

A. No.

Mr. Fletcher: I didn't hear his answer.

Mr. McBee: He said, "No."

A. No, I don't.

[fol. 178] Q. Let me read this statement in the notes of that case, which says that, "Mr. Sard testified as follows: 'We would like to see a reduction in the number of all-Negro dormitories. We believe that there is an advantage to both races if there can be interracial mixing to the extent that this can be done, and maintain the security and safety of the institution.'" Now, do you agree with Mr. Sard that the question of security and safety of the institution is part of the problem of mixing the races?

A. No, I don't.

Q. You do not; all right. Now, let me read you from the same report, "The testimony of Superintendent Weakley and Director Sard, on the other hand, reflected serious doubts about controlling the situation should total integration be ordered at this time." Now, I believe your testimony was that integration of the races was not a problem relating to prison security. Now, do you agree or disagree that there would be a problem?

A. Could I say that at this time is the statement there, the crucial statement; he said, "At this time." Now, if the atmosphere is poor, if management is not ready for it, if the people and you—and if the process of desegregation is handled poorly, why, yes, you would have some difficulty, possibly.

Q. All right. Now, this note says, "Moreover, controlling disturbances is not the only legitimate security concern of prison officials. Equally important is their desire to prevent disturbances from erupting." Now, do you agree with [fol. 179] Mr.—Superintendent Weakley and Director Sard that equally important with the integration of the races is the desire to prevent disturbances from erupting?

A. No, I don't; because I honestly believe that in an integrated situation, tension will go down if properly managed, and that incidences will be reduced. In fourteen years in Atlanta, we went through all kind of integration process, and I never saw any trouble at all.

Q. You do not agree with them in these respects?

A. No, I don't.

Mr. Morgan: No further questions.

Judge Rives: Mr. Boone, I would like to ask you one or two questions.

Witness: Yes, sir.

Judge Rives: Has your main, principal experience in desegregation of prisoners been with the Atlanta Federal Prison?

Witness: Atlanta Federal Prison is the main one; yes, sir.

Judge Rives: And do you have any information as to the proportion of Negroes and whites in that institution as *compared with* the proportion of Negroes and whites in the prisons of Alabama?

Witness: I don't have any information, because I don't know what the proportion is in Alabama. I do know that it is somewhat disproportionate in Atlanta, because we [fol. 180] get all of the District of Columbia incorrigibles when they can't keep them in Lorton, where this case developed, they send them to us; and when I first started working there, I ran D cell block as a guard, and it was nothing but Negroes there, and they were—I had D cell house—

Judge Rives: How many Negroes?

Witness: All were Negroes, and there were three hundred Negroes in that cell house, and co-worker ran the other one; it was about three hundred in that cell house. In addition to the D.C. Negroes and the New York, so to speak, we had southerners, and I would say the number was disproportionate, and the problems were more difficult, because you had sophisticated individuals from all over the country there.

Judge Rives: You mean you had a higher proportion of Negroes in Atlanta, you would think, than you would have of Negroes in the State penitentiaries here?

Witness: I don't know; I think when I said disproportionate I am talking about in terms of the general population. We have gone up as high as, oh, thirty per cent, which is pretty high.

Judge Rives: Now, was there any disorder whatever caused by the desegregation of the prison over there?

Witness: None caused by desegregation, but let's say I have broken up fights; most of them were white man fighting a white man or a Negro fighting a Negro. We have had—most of the unrest has been around poor food or poor management procedures. And when you have a [fol. 181] small percentage of men that are always looking for a weakness, and if the food goes down, the—the—the quality of it, then they start picking on that, and you are liable to end up with a food strike on your hands or something like that.

Judge Rives: Now, I know as a general rule the Federal Government is probably better heeled financially than the State Government is; are the Federal prisons more adequately staffed than the State prisons?

Witness: I would think so, more adequately staffed than most state prisons, other than possibly California or something like that.

Judge Rives: I think that's all. You have any questions?

Judge Lynne: No questions.

Judge Rives: You have any questions?

Judge Johnson: No, sir.

Judge Rives: That's all.

Mr. Morgan: You may come down, Mr. Boone. May it please the Court, now, I don't think that there will be any objection to this; Mr. Billingsley represents several of the plaintiffs in this case and knows where they are and their present status. I would like to read the statement into the record, and see if the counsel for the defendants will stipulate this, or, if not, we will put Mr. Billingsley on the stand.

Judge Rives: Yes.

[fol. 182] Mr. Morgan: Caliph Washington, plaintiff, is confined presently in the Jefferson County Jail. Johnnie Coleman is confined presently in the Kilby Prison. Willie Allen is confined presently in Camp Fayette, Alabama. Cecil McCargo is confined presently in Camp Childersburg, Alabama. And each of them is a Negro.

Mr. A. Frank Lee: (Nodded to indicate affirmative reply)

Mr. Morgan: That's right.

Mr. Fletcher: We would stipulate that is correct insofar as Caliph Washington is concerned; we have no knowledge about the others.

Mr. Morgan: Fine. And there is no objection to the stipulation by anyone else?

Mr. A. Frank Lee: (Shook head to indicate negative reply)

Mr. Morgan: That is it, your honor; we rest.

Judge Rives: Evidence for the defendants; Mr. Madison.

The Clerk: Hold up your right hand, please, sir. Do you solemnly swear the testimony you give in this cause to be the truth, the whole truth, and nothing but the truth, so help you, God?

Witness A. Frank Lee: Yes, sir.

[fol. 183] A. Frank Lee, a Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Madison:

Q. State your name?

A. A. Frank Lee.

Q. Your occupation?

A. Commissioner of Prisons for the Board of Corrections, State of Alabama.

Q. How long you been such?

A. I have been Commissioner since 1960 and Deputy Commissioner since 1954.

Q. When did you first start law enforcement work?

A. 1931.

Q. Where?

A. Eutaw, Alabama.

Q. With whom?

A. The County of Greene; I was Deputy Sheriff nineteen—

Q. Under your father?

A. Yes, sir.

Q. Then were you elected Sheriff of Greene County after that?

A. Yes, sir; I was, when I was twenty-three years old.

Q. What year?

A. 1934.

Q. How long did you serve as Sheriff?

[fol. 184] A. Twenty-four years, nine—ten months.

Q. Did you come from that position to the position you now occupy?

A. I did.

Q. In addition to those positions that you have occupied and the one you occupy now, what other experience have you had with other prison officials or other prisons in visiting them or having meetings or consultations or what not?

A. Well, I am quite familiar with the Atlanta Prison; I am quite familiar with, I would say, twenty-five to forty per cent of all the prisons in the United States, and my connection with them has been varied, from California to New York, and—

Q. What are the different institutions, penal institutions or correctional institutions, that are under your supervision in Alabama?

A. Kilby Prison, here in Montgomery; Trusty Barracks, here in Montgomery; Draper Correctional Center in Elmore County; the Frank Lee Youth Center, in Elmore County; the Julia Tutwiler Prison for Women, in Elmore County; Atmore Prison, at Atmore; State Cattle Ranch, in Hale County; and approximately twenty-five road camps that I can read from a list if you would like those listed.

Mr. Madison: Might we, your honor, introduce that list in evidence?

Judge Rives: Certainly.

Mr. Madison: I would like to use him about some of it.

[fol. 185] Witness: Yes, sir.

Q. Let's start with your Kilby Prison here; do you have any Negroes in that prison?

A. Yes, sir; we have—

Q. Well, now, explain that phase of it?

A. Kilby is our central hospital for the entire system. We have Negroes there confined in the hospital, and we have Negroes working in the hospital, and always have, to my knowledge.

Q. You have had white people working in the hospital, too?

A. Yes, sir; we have had as many as six hundred white, six hundred colored in the institution at one time.

Q. What about treatment; are they kept separate while they are being treated on account of race?

A. Yes, sir; the one—each—is a bay for each one of them, but it is a rather—it is quite a bit of intermingling, but even though there is no bars or room, there are open doors, and they—they do see and associate with each other there.

Q. Now, what other activity, if any, goes on at the Kilby?

A. The manufacture of the automobile license plates, we operate a large textile mill, and we have the twenty-two hundred acre farm there.

Q. Well, now, do the whites and Negroes there work together in that?

A. Well, for many years we worked an equal amount, or maybe more Negroes in the textile mill, but over the years [fol. 186] the supply has dwindled, and we—we only work whites there now in the mill. The Superintendent would much prefer the type Negro that we had for cotton mills, but we just don't—we just don't have them any more.

Q. Now, what type of institution is it at Atmore?

A. Atmore is a large prison farm, and it's devoted entirely to farming.

Judge Johnson: Will you ask him to classify each of them, Mr. Madison, as to close custody, minimum custody, prison farm, honor farms, and so forth?

A. Going back, then, to Kilby is maximum security entirely. The Trusty Barracks is adjacent to Kilby, but operates under entirely different system. It has its own Warden and Deputy and staff there, and the population there is about fifty fifty, approximately a hundred and fifty-six white and approximately a hundred fifty-six colored. Atmore is a maximum, medium, and minimum security institution having both white and colored prisoners, of varying population, based on our work needs, or it may have—I don't remember within one prison as opposed to the other; this may change today, it may change tomorrow, but it is never stable.

Q. Now, do you have a school that is conducted at Atmore?

A. We—we have a vocational rehab program within there; we have our—our main schools are at Draper Correctional Center. We have basic education program at—at Atmore, but for white and colored, most of our school-
[fol. 187] ing is carried on at Draper, for many reasons.

Q. Well, wherever these rehabilitation programs or schools are being conducted, wherever they are being conducted within the prison system, do Negroes and whites both attend?

A. Yes, sir; we had them on the—a large group among a group of fifty-eight that graduated on the 23rd.

Q. What about teachers and instructors?

A. Well, let me see, it is—it's—they have several Negroes on the staff; I believe one is—is a teacher. This is a Federal program that is carried on within the confines of the prison system. I can't be so definite about it, because the people actually do not work for me, but we permit them to function within the prison compound.

Q. Now, proceed with some of the other institutions in the—

A. State Cattle Ranch is an all-white institution, at the present time. We have a capacity there for sixty, and at the present time there are only twenty there. This is on account of the—the population decrease and the type of men that we can assign there; we don't have sufficient to staff it. The Frank Lee Youth Center is all white, and it is down to a population of abouty twenty-eight for the lack of type prisoners coming in. And, of course, Atmore—Draper is—has both, I think, it is about a hundred colored there now and about five hundred whites. Julia Tutwiler is for both colored and white women, and we do, have for many, [fol. 188] many years, housed Federal prisoners that to the best of my knowledge were classed incorrigible and sent to Alabama under contract; had as many as twenty-two at one time, both white and colored.

Q. Now, the girls, where the girls stay, both white and colored, are they segregated?

A. They sleep in different quarters, work together.

Q. Work together and sleep in different quarters?

A. Yes, sir; work in the factory, laundry.

Q. What about the eating facilities; do they eat together?

A. Separate.

Q. Eat separate?

A. Yes, sir.

Q. By the way, when I asked you about—about the eating, in the operation of the prison system, is there any problem involved in—at the eating hour, with reference to disorder or anything occurring; what has been the history in the prisons with reference to that particular time?

A. It has been—while we haven't had a tremendous amount at the eating hour, it has been fairly well accepted that this is—is a dangerous time, because of the large mass of people that are together, which is well pointed out in one of—what is considered one of the best institutions in the country, Joliet, where you eat facing a large number of machine guns; I don't know just how many, but it is a

[fol. 189] column down through there where—and I—I don't think this is necessary in the Alabama system, they don't need to; we don't feed anybody under a gun or anything like that; not a gun in the institution; and I don't think it would be necessary; but it is more possible then than most likely any other time, in my opinion, even though we haven't had that problem.

Q. Now, what are some of the different types of prisoners that are in your institutions or under your supervision?

A. We have just about every type prisoner that you can possibly have, larceny, forgery, murder, mayhem, twelve different sex crimes, and it would be hard to pick out a crime that we don't have someone committed for.

Q. Now, what are some of the things that arise in the prisons, themselves, that they were not convicted for; do the offenses—to illustrate what I mean, do they get hold of dope or anything like that on occasions?

A. Yes, sir; they do, this is—does happen.

Q. And I believe one day—strike that. And I saw a display of different kinds of weapons that you had in your office one day I was out there?

A. Yes, sir.

Q. Where were they taken from?

A. They were taken from beds and lockers and work areas, and this is a constant threat. Under the best supervision that we have, it still happens; they—they sly enough—

[fol. 190] Q. Is that true, also, for Negro and white?

A. Yes, sir; both.

Q. There is no difference?

A. No, sir. They—they tell me that they can make them faster than General Motors can make cars, and sometimes I believe it, and this comes from either one.

Q. Well, do—in your experience, do—do those things come from a desire to escape rather than inflicting bodily harm on somebody within the system, or both?

A. I think it is more desire to inflict on another prisoner—

Q. You do?

A. —rather than an official; I do; yes, sir. They have a lot of petty jealousies, fights, and so forth, that they feel like they have to defend themselves.

Q. Now, what areas under your supervision would you say now are entirely segregated on the basis of race or color?

A. State Cattle Ranch, Frank Lee Youth Center, and twenty-three or four out of the twenty-five—twenty—all the camps but one; there is one white camp.

Judge Rives: You say those were desegregated or segregated? I didn't understand.

Q. They were segregated?

A. Segregated; yes, sir.

Q. All the rest that you haven't enumerated which are under your supervision and control are desegregated?

[fol. 191] A. To some extent, one extent.

Q. To some extent?

A. Yes, sir. Now, the road camps, one reason we have as many of those, I don't have the white prisoners available.

Q. Could you give the Court some basis of the—of the percentage of desegregation in these different places, if you have it; how many whites and how many Negroes, what I am trying to say?

A. Well, in the Trusty Barracks, right here in Montgomery, this is about fifty fifty.

Q. What does that run; just give the number if you can?

A. That is a hundred and sixty-two whites and a hundred and fifty-four colored in that particular institution. At the—at Atmore there are forty-eight whites at this time and one thousand and fifty colored; but not too long ago we had as many as two hundred or two hundred fifty whites there, but for various reasons they were moved out; some of them disciplinary problems, some of them more to the convenience of the prisoner, whether he be white or colored or—so that visitors could visit them more easily, and we—we just change this about from day to day. At

Draper there are five hundred and seventeen whites and ninety-two colored. At Kilby, now, there are thirty people —colored there assigned, other than the twenty, thirty-four that are in the hospital there. In the Youth Center is twenty-six whites, no colored. And in the Quarantine Receiving Unit, we have thirty-four whites and seventy-three Negro.

[fol. 192] Judge Rives: Mr. Madison, will you bring out from Mr. Lee to what extent his conduct as Commissioner of Prisons is influenced by the statutes relating to segregation of prisoners.

Q. Mr. Lee, there are certain statutes that you are familiar with on the books—

A. Yes.

Q. —which require the separation of the races.

A. Yes, sir.

Q. Now, has your policy been to follow those statutes, and has this separation occurred in these places by virtue of those statutes?

A. Yes, sir.

Q. Well, I will ask you this; if there were no statutes which required the separation of the races, and the Court said that the remaining portions of the institutions under your supervision must be desegregated, would they need any injunctive process against you to carry out that order of the Court?

A. No, sir.

Q. And in that event, how long, in your judgment, would you need to follow the direction of the Court in that respect?

A. This would be most difficult for me to answer, but I would—we—we might do it in a month, we might do it in two months, it could—it might take a year; it all depends on when—I don't know just how this will be received, I will be—quite frankly; you got some that will like it, some will dislike it; we would make every effort to make [fol. 193] it—make it function, but I would hate to think that we—we would have to do it in less than a year's time,

even though if we were to get such order, why, we would start possibly tomorrow.

Q. Would you think that if you were given a period of time in which to start in places where you have not already started and complete it a certain period of time and then report to the Court your progress in that connection, you —you think there would be any objection from your standpoint to that, if the objection was made to the Court?

A. Allowed sufficient latitude during that period of time to make the proper decisions and separations, why, I would say yes.

Q. And do you anticipate there will be complaints from the prisoners and others, regardless of what you may do?

A. Yes, sir. It is now.

Q. What are the—what are the problems that can arise in—in prison systems under your jurisdiction—take the worst one, we will say where you have the worst type of prisoner, that could arise, that is not on the basis of race or color, that might require separation?

A. These are these petty jealousies and fights and periods of dissatisfaction that whites have with whites and colored have with colored. I have got some boys in tight security that have killed as many as three people in prison, and I believe would kill another one in a week, I believe, if they were out, and they have all killed members of their race. These people are quite a problem. They [fol. 194] are not—not from a racial standpoint at all. I have got white people that I can't dare put together. I—I think that I can't; at least, I am afraid to.

Q. Do you have problems that arise under your supervision and in your institutions that require immediate decisions, immediate exercise of some judgment or discretion on your part right then and there?

A. This is true, and—and ten per cent of our prisoners require ninety per cent of my time.

Q. Would you think—by that would you mean ninety per cent of them wouldn't give you as much trouble in a desegregation movement as the other ten?

A. No, sir; I do not; that is—that is correct; we have three categories of prisoners, in my opinion. There are eighty per cent that want to do their time under most any conditions, get out, and go their way. There are another ten that are not going to abide by any rule or regulation that anyone sets up. And there is another very tractable group that will rob a bank or go to Sunday School, all depending on who asks them first; they are right there in the middle, and that is just about the way they are.

Mr. Madison: Would you mind passing that over? We have been using it. Now, I would like to offer this as Defendants'—Exhibit 1, Exhibit for the defendants, Lee and the Board of Corrections.

[fol. 195] Judge Rives: (Nodded to indicate affirmative reply)

(Mr. Madison and Mr. Morgan conferred at counsel table)

Judge Rives: It may be received in evidence and so marked.

Mr. Madison: I will give it back to you; I may ask him something else.

Q. Let me ask you this; is most of this information that you have given today from this memorandum you prepared here, was it also given in answers to interrogatories?

A. Not to my knowledge. This is a weekly report that I get; I just brought it with me.

Q. Weekly report?

A. Yes, sir. It is printed each Wednesday.

Mr. Madison: Hand him back that; they may ask him—pass this.

Q. Can you think of anything else that you might wish to state to the Court with reference to the operation of the prison system under your jurisdiction and control germane to this suit which you have not stated?

A. Mr. Madison, I think not; no more than as long as it is clearly understood that we feel that we will have to have some wide area of discretion in making an effort to operate where, if the State law is laid aside, there will be some problems come up that will take some—some quick action, I think, and we will—we will have the cooperation of all our people, our top people, I know; provided there [fol. 196] is some area of—for us to move in.

Mr. Madison: I believe that's all.

Judge Rives: Any other questions any of the defendants care to ask Mr. Lee?

Mr. Fletcher: Yes, sir.

Judge Rives: All right.

By Mr. Fletcher:

Q. Mr. Lee, I ask you, as opposed to separation on the basis of race, in your opinion, is it necessary to classify or designate prisoners because of race?

A. Well, it might possibly be, but you could—you can—you can handle that easier than you can the other, because some of the best jobs that we have in our system are—Negroes hold them.

Q. Well, for your record keeping, is it necessary that you distinguish on your records whether a prisoner is white or colored?

A. You mean for sake of records?

Q. Yes, sir; yes, sir; as opposed—

A. Under the system that we have been operating under, it is necessary identification to—

Q. Well, in your opinion, is it necessary that you be able to classify a prisoner as white or Negro?

A. Due to the fact that we are so detailed in records, I would say that I would require it if—unless I was forbidden to do it.

Q. You keep records on the other physical characteristics, do you not?

[fol. 197]. A. Yes, sir; this is for the sake of identification and other things.

Q. For identification while they are in prison and—

A. Or—yes, sir; or if they are out on parole or escape or something like that.

Q. What other factors do you consider in making your assignments, other than race; for instance, do you put first offenders in the same facilities with repeaters?

A. Yes, sir; we—we have, by necessity, had to; this is—

Q. Do you think—

A. —I don't approve of that, but we have had to do it.

Q. What other factors do you consider important in making your assignments?

A. Well, I don't want to appear facetious, but I will tell you; the number one is the location from where he was sentenced is the number one determining factor here; we can tell more about that than most anything we know about him.

Q. Do you mean within the State of Alabama?

A. Yes, sir.

Q. For instance, Jefferson County?

A. Yes, sir; and within the State, and to some degree outside, but very definitely the large degree of success, whether it is Walker, Greene, Sumter, Hale, Jefferson, or where.

Q. Without laboring the point, would you run through as quickly as you can other factors that you consider?

[fol. 198] A. Well, we consider, number one—I won't say number one, but a strong factor, is where—where he came from, was he born there, or did he—was he a migrant, is he a transient?

Q. And his—whether he is white or a Negro?

A. Yes, sir; regardless, this is—same procedure all the way through is identical. Then have we had him before? We—have we checked his F.B.I. record to show whether he served time in Atlanta or California or where, or did he escape while they had him? What was his record? We write there to get his record. Did he escape while we

had him? What was his work record? How did he get along with other people within the institution? Did he make good on parole? Whether he was paroled one, two, or three times. And those are about the principal things.

Mr. Fletcher: That's all.

Judge Rives: Any questions, Mr. McBee or Mr. Breckenridge?

Mr. McBee: No, sir.

Mr. Breckenridge: No questions.

Cross examination.

By Mr. Morgan:

Q. Mr. Lee you have spent about your whole lifetime in law enforcement work and penal work, have you not?

A. Yes, sir.

Q. In those capacities that you have mentioned to the Court earlier, you have dealt with wardens of city jails [fol. 199] and sheriffs all over the State, I trust; is that correct?

A. Yes, sir; I have.

Q. And your duties in Greene County as Sheriff were substantially similar to the duties of other—every other sheriff in the State of Alabama, were they not?

A. Yes, sir.

Q. And generally, the wardens of city and town jails, their duties are substantially similar throughout the State with other wardens of city and town jails, are they not?

A. Within certain limitations.

Q. Based on—

A. There are some differences.

Q. It would be differences based upon the size of the city, I should think—

A. Yes, sir; yes, sir.

Q. —and the prison population and that sort of thing—

A. Yes, sir.

Q. —but aside from that, there would be no basic distinctions between these particular offices as because of where they are located, are there?

A. Well—

Q. Excluding the population factor?

A. This—this is hard to say; I—I would say there are some—some great differences in the—in the management and the way they are operated, by necessity; what is the [fol. 200] budget in this area, as opposed to Birmingham, and these factors.

Q. How much money they have would be a difference, such as—

A. This has a lot to do with it, whether the jailer's wife is doing the cooking or whether they got a chef or what, you know; these things figure in it.

Q. But other than that sort of difference, there are no differences as far as you know?

A. No, sir.

Q. That's fine. Now, do you keep any Federal prisoners in your State penal institutions?

A. Yes, sir; we have—I don't know whether we got one in Tutwiler, but for years we have kept them, for more than twelve—.

Q. And I think you do that under a contract—

A. With the Government.

Q. —with the United States?

A. Yes, sir; this is correct.

Q. And that contract, I believe, is in the interrogatories —answers to interrogatories—

A. Yes, sir.

Q. —here? Now, you mentioned that you do have a vocational rehabilitation program—

A. At Draper.

Q. —at Draper?

A. Yes, sir.

Q. And from that vocational rehabilitation program, I [fol. 201] wonder if you have had any experience with recidivism?

A. Oh; well, we are making some comparison; this is a research program—

Q. Yes, sir.

A. —and the results—I wouldn't be in a position to—I don't want to say, "Divulge," but we really don't know yet, because it has been going on, the National Institute of Mental Health, for about four and a half years, the M.D.T.A., for about a year or so; I think it would take a longer period of time; I would say, though, that the rate of recidivism for the group that finished these programs are going to be considerably less than the others.

Q. And those classrooms are integrated, are they not?

A. Yes, sir.

Q. And you—you are familiar with Title Three of the Civil Rights Act of 1964, which requires that public institutions basically be not discriminatory on the basis of race—

A. Yes, sir.

Q. —and, of course, Title Six, with respect to Federal funds—

A. Yes, sir.

Q. —and contracts?

A. We have met all their requirements.

Q. Fine. With respect to the compliance statements, have you filled out any compliance statements with the—a Department of the United States Government?

[fol. 202] A. I have.

Q. And the United States Government continues its assistance to you?

A. Yes, sir.

Q. And were those compliance statements basically relating to the vocational rehabilitation program?

A. They were; yes.

Q. Now, you stated—I do want to ask you this question about Draper; living quarters at Draper are racially segregated, are they not?

A. To this extent; the—on this balcony sleep the colored, here sleep the white—

Q. Fine.

A. —in the same cell—they are—there is a separation.

Q. In other words—

A. It is in the same cell block, but one is up on this level, one is here.

Q. And they eat separately, do they not?

A. Yes, sir; from the—served from the same table, but eat separately; yes, sir.

Q. All right. We were talking a few minutes ago about the issue of injunctive process against you.

A. Yes, sir.

Q. And would you, the members—you work for the Prison Board, do you not?

A. Yes, sir; uh. huh.

[fol. 203] Q. The members of that Board are appointed by whom?

A. By the Governor.

Q. And the Governor of the State of Alabama does have a stated policy, does he not, regarding racial segregation?

A. I think I have read that.

Q. Yes, sir.

A. He never has—I never have discussed it with him.

Q. Now, you state that at the Cattle Ranch you have an insufficient number to staff it really correctly, an insufficient number of people, yet all the people who work there are white?

A. Yes, sir; uh, huh.

Q. There are many Negro prisoners, I should think, with farm background and backgrounds which come from, say, Greene County, for instance—

A. Yes, sir.

Q. —who work with cattle—

A. Yes, sir.

Q. —and they would be qualified to fill those positions at the Cattle Ranch if it were not racially segregated.

A. We have some, if I could spare them from the road camps where we earn—as part of our livelihood.

Q. But you—you see no distinction between—

A. But this area is not where I would expect any trouble.

Q. Where would you expect the trouble?

A. In your maximum security.

[fol. 204] Q. And you state you already have trouble there now?

A. Well, not necessarily on account of race; there is trouble between each other, but not—not—no racial problem to speak of—

Q. Right.

A. —no.

Q. Would you tell me a little bit about the Frank Lee Youth Center?

A. This is for the youthful offender under twenty-one years old; this institution has only been open about two years and four months.

Q. What—do you have any special training at the Frank Lee Youth Center?

A. Yes, sir; in forestry, basic education, and up through the eighth grade, but this population is—is small, again due to the insufficient into—the average age of the prisoner coming into Alabama in the last twelve months has been twenty-nine years old, and we have confined these to twenty-one, and it has given us a little problem there.

Q. I notice here that according to the defendants—Defendant Lee, et als., Exhibit number 1—I am not sure what it is—there are twenty-six white males at the Frank Lee Youth Center—

A. Yes, sir.

Q. —is that correct? And no Negro—

A. That is correct.

Q. —males? Yet, this is basically an instructional insti-

[fol. 205] tution, is it not?

A. No, sir; not to the extent that Draper is.

Q. Not to the extent that Draper—

A. We have not been able to gain the population there that we had hoped to, and I can't argue with that; and there is nothing finer than to be able to close down a prison.

Q. Sure.

A. And we—we just haven't—we figured there for a hundred and four, and I predict we will never get them, white and colored combined.

Q. All right, sir; just one moment, if I might. You stated that you—you did have vacancies in the textile mill, and you used to work Negroes and whites together there, as I recall it; I think we were discussing Atmore then—

A. Yes, sir.

Q. —and over the period of years it has now gone to an all-white—

A. Yes, sir.

Q. —operation?

A. We—we no longer—our population is turning over now every two years and eight months in number, and we are not receiving Negroes from textile areas sufficient to put in that already have the training to place there. We just—just not getting them, I don't know, just like we are not getting electricians and plumbers and some others that we used to.

Q. All right, sir; I want to ask you one more question [fol. 206] with respect to the hospitals.

A. Yes, sir.

Q. What kind of work do the Negroes who are employed there do?

A. They do—they wait on patients; we have both white and colored doing the same identical thing.

Q. Same identical kinds of work?

A. Yes, sir; yes, sir.

Q. And the patients are segregated in that hospital?

A. They are; we got three wings, one for tubercular—now, the tubercular is white and colored; then we have a wing for colored; and we have a wing for the white.

Q. Uh, huh; and within the tubercular, they are separated by race?

A. No, sir.

Q. They are not?

A. No, sir.

Q. Are they integrated, one bed for Negroes, and, say—

A. I haven't looked at them right lately, but they are all in the same room; yes, sir.

Q. They are all in the same room?

A. I only have about eighteen, and this is spread—

Q. All right, sir. At the Julia Tutwiler Prison, what kind of work do Negro women do, and the work—

A. They all do the same—same kind of work.

Q. Negro and white women do the same kind of work?

A. Yes, sir; they work in the hospital, factory, laundry, and so forth.

[fol. 207] Q. All right, sir. Do we have on that Exhibit 1 the Draper breakdown racially?

A. Yes, sir; sure do. Five seventeen, ninety-two.

Q. Five seventeen what race?

A. White; ninety-two colored. This is figured—this is based on their needs in the school. Now, this week, I am moving seventeen more colored out of Atmore into there.

Q. Uh, huh.

A. In fact, if they needed twenty, I would move twenty; if they needed ten, it would have been ten.

Q. Yes, sir.

A. Yes, sir.

Q. And would you also state for the record the—the prison population breakdown, Negro to white?

A. One thousand, five hundred and forty-six white; two thousand, five hundred ten colored.

Mr. Morgan: Thank you, sir; that's all.

Judge Rives: Any further questions, gentlemen?

Mr. Breckenridge: Mr. Lee—excuse me.

Mr. Fletcher: None.

Redirect examination.

By Mr. Breckenridge:

Q. Mr. Lee, Mr. Morgan asked you about city jails in the State of Alabama.

[fol. 208] A. Yes, sir.

Q. Now, you are familiar with the city jails—I believe it was Greene County where you were Sheriff?

A. Yes, sir.

Q. You are familiar with the city jails in Greene County?

A. They had none.

Q. They did not have any in Greene County?

A. No, sir.

Q. Where else in Alabama were you familiar with the city jails, city and town jails?

A. Oh, I would say on account of some recent studies I have made I am pretty well familiar with—it is a long list; I can't recall.

Q. All right, let me ask you this; what—what—you are familiar with the Birmingham City Jail in general?

A. Oh, yes, sir.

Q. What differences do you find between the Birmingham City Jail and a small town jail?

A. Well, you mean other than volume of business carried on?

Q. Well, you do find a difference in the volume of business?

A. Yes, sir.

Q. All right; now—

A. Where they may have fifty drunks there on Saturday night, you might have two down in Sumter or over in Coosa or something like that; they are—it is a large volume of business compared to one of the smaller ones.

[fol. 209] Q. What are the differences as to the facilities for keeping the drunks and, say, all other prisoners?

A. Well, in the small city jails, you usually have two, three, or four cells, that is about all; and your Birmingham Jail, Mobile, and I think the new one at Huntsville, they have what they call a tank—

Q. Yes, sir.

A. —in some terminology I think they use.

Q. All right; what is the difference in the supervisory personnel between them?

A. Well, it's considerable difference; they are more highly trained, particularly in the Birmingham Jail.

Q. They are more highly trained in the Birmingham Jail?

A. Yes, sir; you don't find this in the—in the small ones; it is sort of a come and go situation.

Q. All right; what about—what about the supervision of the prisoners in the small jails?

A. It's poor.

Q. Poor; now—

A. In the average small jail as I know it.

Q. Is it a fact or not a fact that in the small city—city and town jails in Alabama there is—that there is less supervision of prisoners than there are in the Birmingham City Jail?

A. There are definitely; yes, sir.

Q. All right; is it still a practice—I mean is it a practice [fol. 210] in the small town for a prisoner to be placed in the jail and there not be any—any—anyone stationed at the jail on a full time basis?

A. I would—yes, sir; it would be entirely possible.

Q. There are, then, places like that?

A. Yes, sir.

Q. And the prisoner, the night—is it a practice in small towns for the Night Marshal to check the jail to see how things are going on during the night, rather than have somebody in supervision throughout the night?

A. That has been my experience.

Q. That has been your experience?

A. Yes, sir.

Q. Then you would—in your opinion, would you say, in your opinion, there is a substantial difference between the smaller town jails in Alabama and the city jails and the Birmingham City Jails in facilities, supervision, and the type of—and the—the type of control between—between these?

A. Yes, sir.

Q. Now, is there any difference in the community—the community in a small town jail; I know—I notice that you

testified that you first—your number one thing was to find out where the prisoner was from?

A. Yes, sir.

Q. And that told you a lot about him?

[fol. 210a] A. Yes, sir.

Q. All right; did that tell you a lot about him because of your knowledge of—of the mores of the community or the —or the preponderance of beliefs in the community or the customs of the community; is that where you get your information from?

A. Yes, sir.

Q. Now, is there a difference in the customs and—and beliefs of communities in Alabama in some of the smaller counties and towns different from those in the City of Birmingham?

A. Based on our experience, there are—there are very definite divisions, several categories.

Mr. Breckenridge: That's all.

Mr. Madison: I have one other thing to ask you, Mr. Lee; the Court might like to know.

By Mr. Madison:

Q. What are the plans, if any, in existence for changing location or additional buildings or new buildings in the prison system of Alabama?

A. Well, we will take bids December 8 for a new institution in Atmore, Alabama, known as the Holman Unit, which will house five hundred prisoners, both colored and white. Plans will be immediately prepared after that for the new Diagnostic Center over in Elmore County, where all prisoners, both white, colored, all but females, will be received there. There are very definite plans for closing one institution right away where there are three hundred [fol. 211] prisoners, and a hundred and fifty white and a hundred and fifty colored, give or take a few, and place them in the maximum security at Kilby. And this is the consummation of twelve years of planning. And then there

is very definite planning ten years ahead from this date for separation of the various types of prisoners, and I am speaking specifically about age, types of crime, and not—not racially.

Mr. Madison: That's all.

Recross examination.

By Mr. Morgan:

Q. Mr. Lee, you stated about the city jails—say in Birmingham, the City Jail having more highly trained personnel than other city jails in Alabama?

A. Yes, sir; than the smaller rural other city jails.

Q. Other rural small town jails?

A. I wouldn't say he's got better than Mobile or better than Huntsville or something like that, but the smaller calaboose type jails.

Q. Right; you ran the jail in Greene County for some years, didn't you?

A. Yes, sir; all my children were born—

Q. When you had a prisoner in that jail, you never left anybody there without somebody being there, did you?

A. No, sir.

Q. That is pretty poor practice, isn't it?

[fol. 212] A. What, to leave them without the—

Q. Leave an unguarded jail?

A. I would certainly think so; we don't advocate that at all, but it happens.

Mr. Morgan: All right, sir; that's fine.

Redirect examination

By Mr. Fletcher:

Q. Mr. Lee, let me ask you if the general differences you expressed as to Birmingham Jails and small town jails, if

this same difference would apply to Jefferson County Jails and small county—rural county jails?

A. Very definitely; yes.

Mr. Fletcher: That's all.

Recross examination.

By Mr. Morgan:

Q. You wouldn't say that the—for instance, with respect to county jails in Alabama, that one sheriff was more, better trained than another sheriff, would you, or more qualified—

A. Yes, sir.

Q. —to keep the jail?

A. Yes, sir; some have been in twelve, fourteen, fifteen, twenty, twenty-five years; some just elected.

Q. Right; so you would base it largely on experience?

A. Yes, sir; well, you would have to, I think.

Q. And I trust that your comment there on differences [fol. 213] would be that there are differences in facilities, as I understand it?

A. There are; there are.

Q. And supervision?

A. Difference in facilities—there are differences in experience of the man operating it and differences in his opinion as to how it should be operated and his willingness to operate it as it should be; they have some very fixed ideas in some areas.

Mr. Morgan: I am sure.

Judge Rives: Mr. Lee, there is no State overall supervision of local prisons, is there or not?

Witness: You mean local jails?

Judge Rives: Yes, sir?

Witness: Yes, sir; these are—these are under my jurisdiction, but I don't—I don't have sufficient staff to do the type job that should be done with it. We—when we get any complaints, we go. And we can only inspect city jails

over ten thousand, the city of ten thousand, unless requested by the Governor.

Judge Rives: What I was thinking of, the plan has been suggested here of making some declaration of what the law is and permitting the force to be made further down.

Witness: Yes, sir.

Judge Rives: Who would we look to for reports from the county and city jails? Could your Department make those reports to us?

Witness: Yes, sir; this is some of the planning that we [fol. 214] have been doing, in anticipation of something like this.

Judge Rives: I see.

Witness: We could do that; yes, sir.

Judge Rives: All right, sir.

Mr. Madison: Defendant Lee and the Board rest, your honor.

Judge Rives: All right.

Judge Johnson: Mr. Lee, let me ask you a question.

Witness: Yes, sir.

Judge Johnson: Do you have any statutory authority to supervise the city jails throughout the State in cities with population less than ten thousand?

Witness: No, sir.

Judge Johnson: Do you have any statutory authority to supervise the operation of the county jails—

Witness: Yes, sir.

Judge Johnson: —of less than ten—all of them?

Witness: Yes, sir.

Judge Johnson: All right. The only jails in the State, then, that you do not have the statutory authority to supervise are those located within the cities that have population of less than ten thousand?

Witness: That is correct.

Judge Johnson: Are there any provisions in the design of the new Holman facility being constructed at Atmore—

[fol. 215] Witness: Yes, sir.

Judge Johnson: —that are based upon the segregation policies, whether it be by custom or by statute?

Witness: Well, to be quite frank with you, it was based for a mixed—planned for a mixed population.

Judge Johnson: And that is the design that is drawn up that you are talking about?

Witness: Yes, sir. Bids are being taken on it on the 8th.

Judge Johnson: That would be your primary State penal institution for maximum security, once it is constructed?

Witness: It will be; yes, sir. For five hundred people.

Judge Johnson: And you have it designed to be on a completely desegregated basis?

Witness: That is correct, sir.

Judge Johnson: That is eating and—

Witness: Yes, sir.

Judge Johnson: —and quarters and everything?

Witness: Yes, sir.

Mr. McBee: Your honor, I wanted to ask him a question. I didn't quite hear him when you asked him the question.

Redirect examination.

By Mr. McBee:

Q. Did you say you had supervision over the city and town jails?

[fol. 216] A. In a population where the city is over ten thousand.

Q. Over ten thousand?

A. Yes, sir; if it is under ten thousand, only do it by executive order from the Governor. I have no right at all; they can't go in unless that they request it.

Q. That is below ten thousand?

A. Yes, sir; below ten thousand. Considerable work is being done in this area now. We are not—we are not any worse off in Alabama than they are in North Carolina. I have got a letter from there this morning pleading for aid and assistance on how to set this up, and we are going to all get in line, I think, and try to work out the plan. We

are doing as good a job with it, except a few states in maybe the east.

Judge Rives: Some other questions?

Mr. McBee: No, sir; that is all; thank you.

Judge Rives: You may come down, Mr. Lee; thank you.

Mr. Fletcher: Judge, we would like to call Sheriff Bailey.

Judge Rives: All right.

The Clerk: You solemnly swear the testimony you give in this cause to be the truth, the whole truth, and nothing but the truth, so help you, God?

Witness Melvin Bailey: I do.

[fol. 217] MELVIN BAILEY, a Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Fletcher:

Q. Would you state your full name for the record?

A. Melvin Bailey.

Q. You are the Sheriff of Jefferson County?

A. Yes, sir.

Q. You have the supervision and control of all of the Jefferson County Prisons?

A. Yes, sir.

Q. Including what prisons?

A. Birmingham and Bessemer Division.

Q. Are these facilities maintained on a racially segregated basis?

A. Yes, sir.

Q. What is the difference in the facilities for the white and for the Negro?

A. No difference.

Q. Do you use the same facilities for white at one time and for Negro at another—

A. Yes, sir.

Q. —within the jail in Birmingham?

A. I might correct that, Mr. Fletcher, in that we have certain designated blocks that have traditionally been for Negro on one end and white on the other.

[fol. 218] Q. Are these then sometimes—do you put white in the Negro block if your white population exceeds the Negro population?

A. Yes, sir.

Q. And the same cells might be used for white on one occasion and for Negro on another?

A. Yes, sir.

Q. How about the eating facilities?

A. The eating facilities are such that it is carted in, and they eat within the block.

Q. Within the cell block—

A. Yes, sir.

Q. —where they are confined? Do they have common bathing facilities?

A. Yes, sir.

Q. They both use the same bathing facilities?

A. Within the block, same—similar facilities.

Q. All right. Do you have any serv—any part of your activities within the jail at all open to both white and colored?

A. Purely in the trusty assignment within the duties, that is to assist the block wardens for maintenance of discipline and order within the block. It might be equal amount on the front as they come in for doctoring and so on, down through the assignments.

Q. The trusties might be on an integrated basis; do they sleep in the same cell blocks with the other—

A. No, sir; no, sir.

[fol. 219] Q. Do you have segregated library, library facilities, for example?

A. No, sir; it is not segregated, but it is used at times differently for the Negro and the white.

Q. How about religious facilities and services?

A. Of late we have integrated religious services on Wednesday each week.

Q. How long have you been in law enforcement?

A. Twenty odd years now.

Q. Prior to becoming Sheriff of Jefferson County, what was your experience?

A. Fifteen years with Birmingham Police Department.

Q. In that capacity, you were familiar with the Birmingham Jail?

A. Yes, sir.

Q. And also the County Jail?

A. Yes, sir.

Q. In your opinion, is there any necessity for classifying prisoners on the basis of race, as opposed to segregating and separating?

A. I think it is very necessary in the vein of law enforcement; this is, I think, very vital in law enforcement theory; yes, sir.

Q. Is there—are there instances when prisoners within the Birmingham—I mean the Jefferson County Jail are without supervision for long lengths of time?

A. We try not to let that happen.

Q. How about at night?

A. No, sir; we have block wardens wherever we have [fol. 220] assigned groups from whatever number up to seventy-six in a given block.

Q. Are there situations in the Jefferson County Jail where you think it is desirable to segregate some prisoners from others on the basis of race?

A. Desirable, yes; depending on the circumstances of the individual that you might pose as hypothetical case, his unruliness or condition; yes.

Q. Along with his personality?

A. Yes, sir.

Q. This is just one factor that—

A. Be he Negro or white, this is desirable at times.

Q. If he tends to be unruly and a trouble maker, do you find it more desirable to segregate him for this reason or for race?

A. I would rather use the word, "Isolation," purely for the sake of safety.

Q. Do you have facilities in the Jefferson County—

A. Yes, sir.

Q. How many; you know?

A. We have—I believe it is eight cells that we use for this purpose. This would have to do with demented, while we are holding for transit to Bryce or Mount Meigs or such.

Q. These—these isolation cells used interchangeably for whites and colored?

A. Yes, sir.

Q. Of course, there is only one man in it?

[fol. 221] A. In each block—or cell.

Q. Let me ask you what factors you consider in determining the safety and security of the prisoners, in your duty to maintain such?

A. I think it is purely a matter of judgment on the man that is there and on the scene.

Q. Well, does his offense, the offense of which he is convicted, constitute one of the factors?

A. Definitely.

Q. Does his age?

A. Definitely.

Q. Does whether or not he has committed other offenses before?

A. Yes, sir.

Q. Then the personality—all of these things go up—go to give you a key as to what his personality is or might be, do they not?

A. Based on the things that Mr. Lee mentioned there, where he is from, what his record is, if you know at the time, it is helpful immediately; if you don't—

Q. Is his race—

A. —if you don't, you better get to know it.

Q. Is race one of these factors that you then consider?

A. Not necessarily; it could be, depending again, Mr. Fletcher, on the case and the circumstance.

Mr. Fletcher: I believe that's all.

[fol. 222] Cross examination.

By Mr. Morgan:

Q. Do you separate visiting hours on the basis of race?

A. Yes, sir.

Q. So, as I take it, the gist of your testimony, there are interchangeable facilities, but they are used by either members of the Negro race, for example, or for the white race at one time, but not on an intermixed basis?

A. Right.

Judge Rives: Any other questions of Sheriff Bailey? If not, you may come down.

Judge Johnson: May I ask him?

Judge Rives: Just a moment, Mr. Bailey.

Judge Johnson: Sheriff, I understand that you do classify and consider it a practice to classify prisoners because of age or the offense that is committed or their personalities or their criminal record—

Witness: Yes, sir.

Judge Johnson: —one or more of those things?

Witness: Yes, sir. All of them most of the time, if not all the time.

Judge Johnson: Is there any instance in your experience where it is necessary to classify solely because of race, without regard to those other things? In order to maintain and operate your prison properly?

Witness: I would have to say no.

[fol. 223] Judge Johnson: All right.

Judge Rives: Any other witnesses for the defendants?

Mr. Fletcher: That is all for the defendant, Bailey.

Judge Rives: You gentlemen have certain documentary evidence you want to introduce?

Mr. McBee: Judge, I believe, of course, our—our defenses were—we weren't sure whether it would be ruled upon before the issues on the main question or not, but we did raise the question of standing, and the question of venue, and the question of representation, but in the

event that we do get beyond that, we would like to put Mr. Austin up for a few questions, very few.

Judge Rives: Well, we will carry those questions with the case.

Mr. McBee: Yes, sir; I understood that.

Judge Rives: There will be no waiver by your proceeding with the merits of the case.

Mr. McBee: Yes, sir. We would like to introduce, may it please the Court, certificate of the Clerk of Jefferson County showing the disposition of the cases against Mr. Thomas E. Houck, Jr., and Mr. Hosea L. Williams. There are four of those, and we would like to have them identified with whatever the appropriate method would be as Exhibits on behalf of the respondent or defendant, Austin. We would also like to—

Judge Rives: Those will be—those will be admitted in evidence.

[fol. 224] Mr. McBee: We also would like to have on the record a stipulation that the averments contained in paragraph one of the eighth defense of the respondent, Austin, is correct, the action taken with reference to the cases having transpired after the filing of this lawsuit, before, of course, this hearing.

Judge Rives: Can that be stipulated, Mr. Morgan?

Mr. Morgan: I have to find it, your honor. Perhaps you would let me see what you are talking about; I am sure I have got it in my file.

Mr. McBee: Mr. Austin deals with those four, I believe, two defendants, two plaintiffs, Hosea Williams and Thomas Houck.

Mr. Morgan: Yes, we will stipulate—we will stipulate with them with respect to their eighth defense, number one, the first sentence thereof, subject to the documents that have been introduced by the City, also.

Judge Rives: Just what does that mean? We can't follow it.

Mr. Morgan: It just says that after, it doesn't give any dates, these documents they just introduced do give the

dates; it says, "The defendant is without knowledge or information sufficient to form a belief as to the allegations of said paragraph, except that Hosea L. Williams and Thomas E. Houck, Jr., have each been briefly confined in the Birmingham Jail or Prison on respective charges of ordinance violations of the City of Birmingham, but each has pleaded guilty of such charges against him, was fined, [fol. 225] and has paid his fine and costs as to some of the charges, and all other charges under which such confinement was had have been dismissed and each of said defendants released and discharged from further custody on account of all such charges." We say that is correct, and the records he has also introduced are more definitive of the date this happened.

Mr. McBee: Mr. Austin, will you take the stand?

Judge Rives: Have you been sworn?

Witness Robert K. Austin: No, sir; I haven't been sworn.

The Clerk: You solemnly swear the testimony you give in this cause to be the truth, the whole truth, and nothing but the truth, so help you, God?

Witness Robert K. Austin: I do.

Robert K. Austin, a Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. McBee:

Q. Mr. Austin, what is your present occupation?

A. I am the Chief Warden in the Birmingham City Jail.

Q. How long have you been such Chief Warden?

A. Since 1946.

Q. Have you had any responsibility in connection with the operation of the City Jail prior to that time?

[fol. 226] A. Yes, sir; I—in 1937 to 1942, I was Assistant Warden, and then I was inducted in service, and then in

the Military Police company, and for a year I ran stockade for the Government in San Severo and Manfredonia.

Q. While in the Army you were in duty or had served in connection with the prison system of the Army?

A. Yes, sir.

Q. And that was in what location?

A. Well, the—one of them was in San Severo, Italy; the other one was in Manfredonia, Italy.

Q. During the time you have served as Warden of stockade, Superintendent, or whatever the proper name would be; have you had any occasion to have any sort of a riot or anything of that kind?

A. No, sir; I have not.

Q. In the—in the main, have—have the facilities in which you have had responsibility been segregated, that is, according to race?

A. Yes, sir.

Q. Have you had any complaints by anybody, either in the military or in the civilian prisons or prison connected with or growing out of the fact that you have used more or less a general policy of segregation of race?

A. No, sir; I have not.

Q. Now, in any respect, does your problems differ from [fol. 227] those of, say, the Atlanta Federal Penitentiary system, or Penitentiary, or any other Federal penitentiary?

A. Yes, sir; definitely so, in that—

Q. In what respect?

A. —mine are—are short-time prisoners, or short-time institution, and we have a great influx of prisoners, around two thousand a month, come in there, and—

Q. What is your average daily population?

A. Well, we have from three hundred to four hundred daily population, just—

Q. And your total—total influx, or total personnel, I mean prison personnel, is—is—amounts to approximately two thousand a month?

A. Yes, sir.

Q. Now, what is about the average stay of the—of the prisoner in your—in your Jail?

A. I would say the average would be seven to fifteen days, because—

Q. Seven to fifteen days?

A. Yes, sir; because some get in and stay only a couple of hours.

Q. Of course, some stay longer?

A. Some stay longer; yes, sir.

Q. Now, with reference to the—to the manner of operating the Jail, are there some areas or activities which are on an integrated basis?

A. Yes, sir; I have—

[fol. 228] Q. What are those?

A. Sir?

Q. What are those?

A. I have—the trusties are integrated; I have work gangs that are integrated; I have the particular farm crew that is integrated; and also a work crew that makes concrete pipe is integrated; and then our maintenance crew is integrated to the extent that if you find, as Mr. Lee pointed out, you find an artificer or something you need, whether he is white or colored, we use him.

Q. In other words, you assign the prisoner to a duty that he is capable of performing, regardless of race?

A. Yes, sir.

Q. Now, with reference to the trusty system, do you have occasions when—when colored trusties will have responsibility or supervision over white prisoners and vice versa?

A. Yes, sir; at times there will be—they are kind of little straw bosses, but they are under supervision of a Warden.

Q. The trusty is nevertheless under general supervision of a Warden?

A. Yes, sir.

Q. Now, in reference to the eating facilities, are there occasions when the facilities for eating is integrated?

A. There are occasions when the trusties will eat in the same dining room, but I have never actually seen them eat at the same table.

Q. Do you have any prison rule that would prohibit them [fol. 229] from eating at the same table if they wanted to?

A. No, sir; if they wanted to, they could.

Q. They still could do it if they wish?

A. Yes, sir.

Q. Oh, yes; oh, yes; I should have asked you about this; do you have a particular problem in reference to incoming prisoners different from that which would be experienced by the—by the prisons, that is, the—like Kilby or like the Atlanta Federal Penitentiary?

A. Yes, sir; I will have, I would say, over fifty per cent of my prison population that comes in is for the use of alcohol, alcoholic beverages, and they are in a drunken condition, and cases like that, or something related to alcohol like disorderly conduct or something.

Q. Does that pose any particular problem in the matter of security and discipline of the prison?

A. Well, definitely, sir.

Q. In your judgment and opinion, would it aggravate the prison security problems to—and the safety of the prisoners to integrate the drunk tank, that is to say, put Negro prisoners and white prisoners together?

A. Yes, sir; I hope I am not the Chief Warden when it has to be done.

Q. In other words, in your judgment and opinion, it would—it would be a safety factor, a negative safety factor?

A. It certainly would.

[fol. 230] Mr. McBee: All right. That's all.

Mr. Morgan: Any questions?

Mr. Madison: (Shook head to indicate negative reply)

Cross examination.

By Mr. Morgan:

Q. Mr. Austin, you—you have, say, fifty per cent of the folks in your jail for drunk charges?

A. I would say an average of fifty; yes, sir.

Q. And what security precautions do you take for those people now?

A. I place them in separate cells.

Q. You mean separate because—on the basis of race, or do you have a big bull pen?

A. No, I have a big bull pen and a big bull pen for the colored.

Q. You still have some difficulty, don't you?

A. Oh, yes, sir.

Q. With white drunk folks hitting white drunk folks?

A. Yes, sir.

Q. And colored folks hitting colored folks?

A. I have an individual—I have in each bull pen, as we speak of, eight individual cells, that I place a man when he is first put in there, and then on each side, and my problem is that I—I have so many coming in, I can't keep them in there as long as I would like for them to be, and that poses a problem.

Q. How long do you keep them in there?

A. Well, it all depends; one person, it is according to [fol. 231] what condition he manifests, himself, when he comes in.

Q. You have no difficulty with respect to your trusties, your work gangs, your farm crews, and your maintenance crew, and even with respect to the sort of straw boss supervision I think you mentioned—

A. (Nodded to indicate affirmative reply)

Q. —of Negroes over white or the integration of the other operations I just mentioned?

A. No, sir; I have not.

Q. So your whole experience shows you that integration creates no problems, at least with respect to the categories of the prison population that you work with?

A. Which I work with; no, sir.

Q. In fact, because of your prison pop—your jail population and the number of people that go through that jail, quite probably more people in the State of Alabama have

contact with jails through your jail facility than any other jail in the State; is that not correct?

A. I would think so.

Q. Do you have any separation of visiting hours?

A. Yes, sir; due to the fact that we have a limited space for—for visitors. We don't allow our visitors to come inside the jail, as some do, to visit; ours is in a lobby, and it is a limited—

Q. Right; but you only allow whites there at one time and Negroes there a separate time; is that correct?

[fol. 232] A. That's right, sir.

Q. And you have no experience whatsoever with respect to Negroes being in the drunk tank after they come out of your individual cells along with whites in that same drunk tank, do you?

A. No, sir; I have not.

Mr. Morgan: Thank you.

Judge Rives: Mr. Austin, as I understand, your whole chief concern about integrating is as to your drunk tank?

Witness: Yes, sir; definitely, sir.

Judge Rives: And you—you don't have much problem except as to that?

Witness: Any foreseeable problem, I think I could work the other out if given time.

Judge Rives: All right, sir. Any other questions for Mr. Austin?

Mr. McBee: No, sir.

Judge Rives: You may come down, Mr. Austin. Any other witnesses, gentlemen?

Mr. McBee: No, sir; that's all.

Judge Rives: Any other documentary evidence to be introduced?

Mr. Morgan: No.

Judge Rives: Both sides rest; all sides rest, then. You have got pretty complete briefs in the case, we have had an opportunity to read over. You gentlemen wish to argue the case?

[fol. 233] Mr. Morgan: At the Court's pleasure, your honor, we—but I'm anxious either way; if it would help the Court—

Judge Rives: I don't want to cut off on you, but I think we have pretty well—

Mr. McBee: There is only one thing we did want to comment on, your honor; we did not get the brief of the complainants, the last brief, until this morning. We would like to comment on the fact that—and remind the Court, I am sure the Court is familiar with it, but the—a point that was raised, as we understand it, in this brief is that at the time the suit was filed the two plaintiffs, Williams, I believe, and Houck, were subject to the possibility of being returned to the City Jail of the City of Birmingham.

Judge Rives: You want a few days to answer that brief?

Mr. McBee: Beg your pardon?

Judge Rives: Do you wish a few days to answer that brief?

Mr. McBee: Yes, sir; we would like to have the opportunity to do that.

Judge Rives: Would five days be sufficient?

Mr. McBee: Yes, sir; I think so.

Judge Rives: All right.

Mr. Madison: Your honor, I don't wish to argue the case, but would like to call the Court's attention to one section of Section 4 as set forth in our brief in full, and it [fol. 234] deals with the authority in Section 4 of Title 45 of the Code of Alabama, one of the sections under attack, and it deals with the authority as to tubercular patients and management of hospitals. It is a very important Code section in that area. And down in there it says, "There shall be proper separation of convicts from free persons, whites from blacks." I think that Section, in order to preserve it, not tamper with it, could be well construed as proper separation would mean whether separation is based on race or color.

Judge Rives: What is that section?

Mr. Madison: Section 4 of Title 45. I know pretty well what it meant when it was adopted, but there is a difference now.

Judge Rives: Yes, sir. Proper segregation, you think, meant one thing then and might be construed to mean something else now?

Mr. Madison: Yes, sir.

Judge Rives: Any—

Mr. Morgan: We have no argument or response to make, your honor.

Judge Rives: We will take the case, then, under submission on all questions, then, gentlemen.

Mr. Fletcher: Judge, if I might—

Judge Rives: Yes.

Mr. Fletcher: At the pretrial hearing, Judge Johnson requested that we submit decrees, forms of decree, which [fol. 235] I have filed with the Bailiff this morning; I didn't—

Judge Johnson: That was what you proposed as far as the remedies are concerned—

Mr. Fletcher: Right.

Judge Johnson: —to help us.

Judge Lynne: Mr. Clerk, here is an Exhibit.

Mr. Morgan: Mr.—no, he just wanted to give you this.

Judge Johnson: Just on what they proposed about how fast it goes and so forth.

Judge Rives: Very well, then, gentlemen; Court will stand in recess until further order.

Court Reporter's certificate to foregoing transcript (omitted in printing).

PRISON POPULATION
NOVEMBER 19TH 1966

STATE OF ALABAMA
BOARD OF CORR[illegible]TIONS

INSTITUTION	STATE				COUNTY				TOTAL	HWY QUOTA
	WM	CM	WF	CF	WM	CM	WF	CF		
CAMP ALEX CITY		37							37	56
CAMP AUBURN		53							53	60
CAMP CHATOM		24							24	52
CAMP CHILDERSBURG		40							40	53
CAMP CULLMAN		58							58	63
CAMP DOTHAN		47							47	61
CAMP EIGHT MILE		40							40	50
CAMP ELBA		42							42	71
CAMP EVERGREEN		30							30	52
CAMP FAYETTE		30							30	56
CAMP FORT PAYNE	42								42	60
CAMP GROVE HILL		26							26	77
CAMP GUNTERSVILLE		45							45	57
CAMP HAMILTON		40							40	60
CAMP HOLLIS		34							34	53
CAMP LIVINGSTON		25							25	50
CAMP LOXLEY		39							39	73
CAMP MAPLESVILLE		32							32	48
CAMP SELMA	1	36							37	62
CAMP THOMASTON		75							75	57
CAMP TROY		76							76	82
CAMP TUSCALOOSA		41							41	62
CAMP UN SPRINGS		47							47	68
TOTAL ROAD CAMPS	43	917							960	1,383

STATE OF ALABAMA [fol. 238]

BOARD OF CORR TIONS

INSTITUTION	STATE				COUNTY				TOTAL	HWY QUOTA
	WM	CM	WF	CF	WM	CM	WF	CF		
ATMORE PRISON	48	1,050							1,098	
DRAPER PRISON	517	92				1			610	
KILBY PRISON	597	30							627	
J TUTWILER PRISON		1	35	97					133	
CATTLE RANCH	18								18	
TRUSTY BARRACKS	162	154							316	40
F L YOUTH CENTER	26								26	
KILBY HOSPITAL	12	34							46	
QUARENTINE REC&CT	34	73							107	
TOTAL ASSIGNED	1,457	2,351	35	97		1			3,941	1,423
NEW NOT ASSIGNED	54	60							114	
GRAND TOTAL	1,511	2,411	35	97		1			4,055	1,423
		1511		2411						
		35		97						
		1546		2508						
				2						
				2510						
TOTAL ROAD CAMPS									960	*
TRUSTY BARRACKS									40	*
TOTAL HWY ROADS									1,000	*

[fol. 239]

CLERK'S CERTIFICATE AS TO ORDER IN CASE

CIRCUIT COURT

Tenth Judicial Circuit of Alabama

No. 28664

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

I, the undersigned, as Clerk of said Circuit Court, in and for said State and County, do hereby certify that in the cause of City of Birmingham Plaintiff, vs. Thomas E. Houck Jr. Defendant, the following order was made, to-wit:

May 25, 1966, Nolle Prossed without costs, recommendation of Wm. C. Walker, Assistant City Attorney.

Elias C. Watson, Jr., Circuit Judge

Witness my hand, this the 23rd day of November 1966

/s/ JULIAN SWIFT
Clerk Circuit Court.

[fol. 240]

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

I, Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal, and that I am the qualified Clerk of said Court, and the keeper of said Seal. I further certify that Honorable Wallace Gibson is a duly commissioned Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, and under the Laws of said State all of his official acts as such Judge are entitled to full faith and credit. I further certify that his official signature to the certificate is his genuine official signature and in due form.

IN TESTIMONY WHEREOF, I hereunto affix my official signature and Seal of the Court, at Birmingham, Alabama, this the 23rd day of November, 1966.

/s/ JULIAN SWIFT
Clerk of the Circuit Court of the
Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

I, Wallace Gibson, Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that the same is a Court of Record, having a Clerk and Seal, and that Julian Swift is the qualified Clerk of said Court, and the keeper of the Seal thereof, and that his official signature to the foregoing certificate is his genuine official signature with the Seal of said Court affixed.

Witness my hand and official signature, at Birmingham, Alabama, this the 23rd day of November, 1966.

/s/ WALLACE GIBSON
Judge of the Circuit Court of the
Tenth Judicial Circuit of Alabama.

[fol. 241]

CLERK'S CERTIFICATE AS TO ORDER IN CASE

CIRCUIT COURT
Tenth Judicial Circuit of Alabama
No. 28713

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

I, the undersigned, as Clerk of said Circuit Court, in and for said State and County, do hereby certify that in the cause of City of Birmingham Plaintiff, vs. Thomas E. Houck Jr. Defendant, the following order was made, to-wit:

May 25, 1966, Nolle Prossed without costs, recommendation of Wm. C. Walker, Assistant City Attorney.

Elias C. Watson, Jr., Circuit Judge

Witness my hand, this the 23rd day of November 1966

/s/ JULIAN SWIFT
Clerk Circuit Court.

[fol. 242]

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

I, Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal, and that I am the qualified Clerk of said Court, and the keeper of said Seal. I further certify that Honorable Wallace Gibson is a duly commissioned Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, and under the Laws of said State all of his official acts as such Judge are entitled to full faith and credit. I further certify that his official signature to the certificate is his genuine official signature and in due form.

IN TESTIMONY WHEREOF, I hereunto affix my official signature and Seal of the Court, at Birmingham, Alabama, this the 23rd day of November, 1966.

/s/ JULIAN SWIFT
Clerk of the Circuit Court of the
Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

I, Wallace Gibson, Judge of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that the same is a Court of Record, having a Clerk and Seal, and that Julian Swift is the qualified Clerk of said Court, and the keeper of the Seal thereof, and that his official signature to the foregoing certificate is his genuine official signature with the Seal of said Court affixed.

Witness my hand and official signature, at Birmingham, Alabama, this the 23rd day of November, 1966.

/s/ WALLACE GIBSON
Judge of the Circuit Court of the
Tenth Judicial Circuit of Alabama.

[fol. 243]

No. 28712

THE STATE

CITY OF BIRMINGHAM

vs.

THOMAS E. HOUCK JR.

Appealed from Recorder's Court

(Assaulting an Officer)

Honorable Elias C. Watson, Jr., Judge Presiding

This the 25th day of May, 1966, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the defendant being duly arraigned upon the oral Complaint of the City of Birmingham, charging the de-

fendant with the offense designated in the Appeal Bond from the Recorder's Court of the City of Birmingham, Alabama, in this cause, for his plea thereto says that he is guilty of interfering with an officer in performance of duties, as charged in said oral Complaint, and on recommendation of City Attorney Walker, the Court assessed a fine of One Hundred Dollars ($100.00) and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty of interfering with an officer in performance of duties, as charged in said oral Complaint, and that he pay a fine of One Hundred Dollars ($100.00) and costs of this cause.

The said defendant paid said fine and costs to the Clerk and was discharged.

[fol. 244]

CERTIFICATE OF JUDGMENT UNDER ACTS OF CONGRESS.

CIRCUIT COURT

Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, JULIAN SWIFT, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, in and for said State and County, do hereby certify that the foregoing page contains a full, true and correct copy and exemplification of the Judgment Entry of the cause of City of Birmingham Plaintiff, vs. Thomas E. Houck Jr. Defendant, Case No. 28712, as appears of record in said Court.

Witness my hand and the seal of said Court, this 22nd day of November 1966

/s/ JULIAN SWIFT
Clerk of Circuit Court of the
Tenth Judicial Circuit of Ala.

(Seal)

CIRCUIT COURT

Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, Geo. Lewis Bailes, one of the Judges of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that JULIAN SWIFT, whose name is signed to the preceding certificate, is the Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of said Circuit Court, and that the attestation thereof is in due form of law.

This 22nd day of November 1966

/s/ GEO. LEWIS BAILES
One of the Judges of the Circuit Court
of the Tenth Judicial Circuit of Ala.

CIRCUIT COURT

Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, JULIAN SWIFT, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that Hon. Geo. Lewis Bailes whose name is signed to the foregoing certificate, is one of the Judges of the Tenth Judicial Circuit of Alabama, duly elected and sworn, and that the signature of said Judge is genuine.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this 22nd day of November 1966

/s/ JULIAN SWIFT
Clerk of Circuit Court of the
Tenth Judicial Circuit of Ala.

(Seal)

[fol. 245]

No. 28725

THE STATE

CITY OF BIRMINGHAM

vs.

HOSEA L. WILLIAMS

Appealed from Recorder's Court

(Reckless Driving)

Honorable Elias C. Watson, Jr., Judge Presiding

This the 25th day of May, 1966, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the defendant being duly arraigned upon the oral Complaint of the City of Birmingham, charging the defendant with the offense designated in the Appeal Bond from the Recorder's Court of the City of Birmingham, Alabama, in this cause, for his plea thereto says that he is guilty of speeding, as charged in said oral Complaint, and on recommendation of City Attorney Walker, the Court assessed a fine of Twenty-five Dollars ($25.00) and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty of speeding, as charged in said oral Complaint, and that he pay a fine of Twenty-five Dollars ($25.00) and costs of this cause.

The said defendant paid said fine and costs to the Clerk and was discharged.

[fol. 246]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DEFENDANT'S EXHIBIT No. 2

CERTIFICATE OF JUDGMENT UNDER ACTS OF CONGRESS.

CIRCUIT COURT

Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, JULIAN SWIFT, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, in and for said State and County, do hereby certify that the foregoing page contains a full, true and correct copy and exemplification of the Judgment Entry of the cause of City of Birmingham, Plaintiff, vs. Hosea L. Williams Defendant, Case No. 28725, as appears of record in said Court.

Witness my hand and the seal of said Court, this 22nd day of November 1966

/s/ JULIAN SWIFT
Clerk of Circuit Court of the
Tenth Judicial Circuit of Ala.

(Seal)

CIRCUIT COURT

Tenth Judicial Circuit of Alabama.

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, Geo. Lewis Bailes, one of the Judges of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that JULIAN SWIFT, whose name is signed to the

preceding certificate, is the Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of said Circuit Court, and that the attestation thereof is in due form of law.

This 22nd day of November 1966

/s/ Geo. Lewis Bailes
One of the Judges of the Circuit Court
of the Tenth Judicial Circuit of Ala.

Circuit Court

Tenth Judicial Circuit of Alabama.

The State of Alabama
Jefferson County

I, Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that Hon. Geo. Lewis Bailes whose name is signed to the foregoing certificate, is one of the Judges of the Tenth Judicial Circuit of Alabama, duly elected and sworn, and that the signature of said Judge is genuine.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this 22nd day of November 1966

/s/ Julian Swift
Clerk of Circuit Court of the
Tenth Judicial Circuit of Ala.

[fol. 248] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 249]

SUPREME COURT OF THE UNITED STATES

No. 1208, October Term, 1966

FRANK LEE, Commissioner of Corrections of Alabama, et al., Appellants,

v.

CALIPH WASHINGTON, et al.

Appeal from the United States District Court for the Middle District of Alabama.

ORDER NOTING PROBABLE JURISDICTION—May 29, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

LIBRARY
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FILED
MAR 31 1967
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1966

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

vs.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually ahd as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLANTS' JURISDICTIONAL STATEMENT

MacDONALD GALLION
Attorney General of the
State of Alabama

GORDON MADISON
Assistant Attorney General
of the State of Alabama

NICHOLAS S. HARE
Special Assistant Attorney General
of the State of Alabama

J. M. BRECKENRIDGE, City Attorney
for the City of Birmingham,

Attorney for Robert K. Austin, as
Warden of the City Jail of
Birmingham, Alabama, Appellant

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1966

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

vs.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLANTS' JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

This is an appeal by Frank Lee, as Commissioner of Board of Corrections of Alabama, et al., and Robert K. Austin as Warden of the City Jail of Birmingham, Alabama, from judgment entered on December 12, 1966, in accordance with the Order of the District Court of the United States for the Middle District of Alabama, as a three-judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C.. §2281. This statement is submitted by the appellants to show that the Su-

preme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

OPINION BELOW

The Opinion of the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge district court, is unreported at this date. The Opinion of said Court is set forth in the Appendix A, *infra*, at page 13.

JURISDICTION

This suit was brought by the plaintiffs (appellees) in the Court below allegedly under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States and the following provisions of the United States Code: Title 42, Sections 1981 and 1983; Sections 1331, 1343 (3) (4), 2201, 2281 and 2283 of Title 28, United States Code; Sections 1981, 1983 and 1988 of Title 42, United States Code, and Rule 23 (a) (3) of the Federal Rules of Civil Procedure.

The appellees, plaintiffs below, claimed a right not to be segregated, classified, designated or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. The plaintiffs also in the complaint asserted that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States, which statutes are as follows: Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

The appellants, defendants below, denied the claims of appellees, plaintiffs below, and alleged that the separation of the Negro and white prisoners in the prisons and jails of Ala-

bama was for reasons of internal security of the prisons and jails and to protect the prisoners, jailers and other from bodily harm.

The United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court on the 12th day of December 1966, rendered a final order (set out in full in the Appendix, *infra*, page 13), which held each of said Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, to be violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama, and ordered the total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year, and as to the county and city jail systems a completed desegregation within six months, in all areas, including quarters, except in very exceptional instances as, for example, the use of the "drunk tank." Said court ordered that the appellant Frank Lee (a defendant below) "as Commissioner of the Board of Corrections for the State of Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year from the date of this decree."

Said court also ordered that appellant Robert K. Austin (a defendant below) "as Warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree."

By said order of the 12th of December 1966, said court also ordered that "the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama."

Notice of Appeal was filed by defendants Frank Lee, as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as Members of the Board of Corrections of Alabama, on February 6, 1967. Notice of Appeal was filed by Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama on February 8, 1967.

Jurisdiction to review by appeal an order granting or denying a permanent injunction in any civil action, suit or proceeding required by an act of Congress to be heard and determined by a district court of three judges is conferred upon this court by 28 U.S. Code, Section 1253.

That such a jurisdiction exists in the circumstances of this case is sustained by the following authorities: *Radio Corporation of America vs. United States*, 341 U.S. 412; *Florida Lime & Avocado Growers, Inc. vs. Jacobsen*, 362 U.S. 73.

STATUTES INVOLVED

The statutes involved in this case are Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958. Each of said sections are set out separately in Appendix B, *infra, page* 24, *et seq.*

QUESTIONS PRESENTED

1. Do state statutes which require the separation of white

and Negro prisoners in state penal institutions and county and city jails violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Does a prisoner serving a penitentiary sentence have the constitutional right to question the validity of state statutes requiring the separation of prisoners by race?

3. Does the District Court have jurisdiction and authority to require the defendant Commissioner of Corrections of Alabama to supervise the desegregation of all penal state facilities, including cities of under ten thousand population where state statutes invest authority in the said Commissioner only as to cities over ten thousand population?

4. Are §§ 4, 52, 121, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require the segregation of the races in the prisons and jails of Alabama?

5. Does the District Court have authority to order the defendant Frank Lee, as Commissioner of the Board of Corrections, to make reports to the court every three months, beginning March 15, 1967, as to the steps taken and progress made to eliminate segregation in the state penal institutions and the county and city jails in the State of Alabama?

6. Do the plaintiffs in this case have standing to challenge any of the statutes or practices requiring segregation, or relating to the segregation by race of the penal facilities of the City of Birmingham?

7. Is the appellant Austin (a defendant below) representative of other wardens and jailers of city and town jails of Alabama to the extent that plaintiffs may maintain this action against said Austin as representing a class composed of all other city wardens and jailers in Alabama under Rule 23, Federal Rules of Civil Procedure.

8. Does a Negro prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the white race where such warden is not compelled to do so by statute?

9. Does a white prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the Negro race, where such warden is not compelled to do so by statute?

10. Does the Order appealed from unduly restrict the exercise of lawful discretion on the part of state prison officials in the administration of the prisons?

STATEMENT

Caliph Washington, Hosea L. Williams, Julia Allen, individually and as mother and next friend of Willie Allen, a minor, Willie Allen, Agnes Beavers, individually and as mother and next friend of Cecil McCargo, Jr., a minor, Cecil McCargo, Jr., Johnnie Coleman and Thomas E. Houck, Jr., for themselves, jointly and severally, and for all others similarly situated, as plaintiffs, filed Civil Action No. 2350-N in the United States District Court for the Middle District of Alabama, Northern Division, against Frank Lee, as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as members of the Board of Corrections of Alabama; A. Melvin Bailey, as Sheriff of Jefferson County, Alabama and all other sheriffs of Alabama, jointly and severally, who are similarly situated; Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, and all other wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated, as defendants, on February 18, 1966.

Plaintiffs Caliph Washington, Julia Allen, Willie Allen, Agnes Beavers, Cecil McCargo, Jr. and Johnnie Coleman are Negro citizens and residents of Alabama. Plaintiff Hosea L. Williams is a Negro citizen and resident of Georgia. Plaintiff

Thomas E. Houck, Jr. is a white citizen and resident of Florida. Plaintiff Johnnie Coleman is incarcerated in Kilby Prison, Montgomery, Alabama (a state prison). Plaintiff Willie Allen is confined in Camp Fayette, Alabama (a state prison). Plaintiff Cecil McCargo is confined in Camp Childersburg, Alabama (a state prison). Plaintiff Caliph Washington is confined in Jefferson County Jail. Plaintiff Hosea L. Williams, prior to suit, had been incarcerated briefly in Birmingham City Jail, Birmingham, Alabama on a charge of ordinance violation, but prior to the trial of this case had pleaded guilty, paid a fine and been discharged from further custody. Plaintiff Thomas E. Houck, Jr., a white man, prior to suit had been incarcerated briefly in Birmingham City Jail, Birmingham, Alabama, but prior to the trial of this case had pleaded guilty, paid a fine and been discharged from further custody.

The prison population in Alabama is 1546 white and 2510 Negro.

Defendant (appellant) Frank Lee, Commissioner of the Board of Corrections of the State of Alabama testified, in substance, that in his opinion orderly desegregation could be accomplished in the Alabama prison system without unduly upsetting or impairing prison discipline or security provided the prison officials were given sufficient time and were allowed some administrative discretion, and that the new prison facilities planned and under construction were designed upon an integrated basis. He testified that if the prisoners were integrated that trouble could be expected in the maximum security section of the prisons.

The order of the District Court appealed from orders of the appellant Lee, as Commissioner of the Board of Corrections, to "*supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama* and report to this Court every three months beginning March 15, 1967, concerning steps being taken in the county and city jails and other penal facilities throughout the State of Alabama." (Emphasis added) Yet, the law is clear, as was brought out in the testimony, that the Commissioner of the Board of Corrections is without authority to supervise jails of cities having a population of less than ten thousand.

The Birmingham City Jail, of which defendant Austin is warden, receives about two thousand prisoners a month. Most of the prisoners in the Birmingham Jail are short-time prisoners. The average daily prison population is from three hundred to four hundred. The average stay of a prisoner in the Birmingham Jail is from seven to fifteen days. There is some integration in the Birmingham City Jail insofar as work is concerned as follows: the trustees are integrated; some of the work gangs are integrated; the farm crew is integrated; the work crew that makes concrete pipe is integrated; the maintenance crew is integrated. The prisoners eat in the same dining room, but at different times. The white and Negro trustees eat in the dining room at the same time and no regulation prevents them from eating at the same table, however, they voluntarily eat at separate tables according to race. There are sleeping or dormitory areas occupied by only Negro prisoners and other sleeping or dormitory areas occupied only by white prisoners.

The Birmingham Jail has a different problem as to receiving prisoners from that which a state prison may experience. Fifty per cent of the incoming prisoners to the Birmingham City Jail are received because of the use of alcohol and are in a drunken condition. These prisoners are placed in what is known as a drunk tank. There is one drunk tank for Negroes and one drunk tank for white persons. To integrate the drunk tanks at the Birmingham City Jail would aggravate the prison security problems and endanger the safety of the prisoners.

The visiting facilities of the Birmingham City Jail are the same, but white prisoners receive visitors on one day and Negro prisoners receive visitors on a different day.

Defendant Austin did orally testify in substance that if ordered to integrate the Birmingham City Jail his main concern would be with the drunk tank and that any other "foreseeable problem I think I could work out if given time."

Defendant Austin stated in (7) (b) of his answers to plaintiffs' interrogatories his reason for the separation of prisoners by race in the Birmingham City Jail to the extent that they are so separated as follows:

"In the operation of the Birmingham City Jail, which is under my supervision, I have separated Negro and white prisoners because, in my opinion, it is necessary to do so in order to maintain the internal security of this prison or jail and protect the prisoners and others from bodily harm."

THE QUESTIONS ARE SUBSTANTIAL

This Court has not passed on the questions presented in this appeal.

This appeal presents important constitutional questions involving the authority of federal courts to direct particulars of prison management in that sensitive area of prison discipline and security. It is important to the public, law enforcement officers and municipal officers to know whether or not the Fourteenth Amendment contemplates the substitution of judicial opinion for the opinion of competent prison adminstrators as to procedures which are determined by such administrators to be desirable or necessary for the maintenance of prison discipline and security.

It is important to know to what extent, if any, may claimed Fourteenth Amendment rights of a prisoner be permitted to take precedence over rights of other prisoners and jailers to have prison administrators follow a procedure that will, in the opinion of such administrators, best insure prison discipline and security.

Prisoners, prison employees and the public are entitled to a procedure in prisons that will best insure prison discipline and security and remove causes for disorders and riots. Such procedures can best be determined by persons charged by law with the duty of maintaining prison discipline and security.

Some Fourteenth Amendment rights may follow a prisoner into jail. Other rights do not.

It has been held that a prisoner placed in jail has only such

rights, including constitutional rights, as will not impair prison discipline or internal security. *Sostre vs. McGinnis,* 334 F. 2d 906, *cert. den.,* 379 U.S. 892.

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland,* 337 F. 2d 72.

The right to receive letters in prison may be limited. *United States vs. Illinois, et al.,* 343 F. 2d 120.

Religious freedom, a constitutional right, may be limited in prison. *Sostre vs. McGinnis,* 334 F. 2d 906, *cert. den.,* 379 U.S. 892.

The right of a prisoner to receive mail yields to the requirement of maintaining internal discipline of prison. *United States vs. Fay,* 197 F. Supp. 855.

The attendance at a prison school may be denied. *United States vs. Pate,* 229 F. Supp. 818.

The order of the three-judge court from which this appeal is taken places in the court detailed supervisory authority over prison officials in the administrative management of their prisons insofar as such management relates to race. This order dilutes prison officials' authority to maintain prison discipline and security where race is a factor and can result in procedures being adopted because such order seems to so demand rather than being adopted solely with a view of what is best for prison discipline and security in a particular prison or jail.

As to whether state and city prison officials shall be permitted to manage and regulate their prisons and separate, segregate and assign prisoners all as to them is in the best interest of prison discipline and security, without regard to ordered directions from a federal court, is a serious constitutional question of the gravest importance. A decision of this Court is needed to set at rest once and for all the issues named in this case.

We respectfully ask this Court to hold that the separation of the races in a prison or jail, by administrative officials, in charge of such prison or jail, when they are of the opinion that

such separation will aid in maintaining discipline and prison security, is not a violation of any constitutional right of a prisoner, either Negro or white. To hold otherwise will involve federal courts throughout this nation in minute supervision of prison management in this area, and would preempt the exercise of lawful and reasonable discretion on the part of prison administrators. A prisoner loses his right to select his associates when he is committed to prison. His associates are selected by the prison administrators in all areas. The area of race should not be an exception.

This case presents a question of substantial importance which affects the State of Alabama and every city and town thereof. If the three-judge district court is correct in its holding, then regardless of prison discipline and internal security every state, county and municipal prison or jail in the State of Alabama must confine their prisoners on an integrated basis. This case will be cited in other cases throughout the nation as persuasive authority on this subject, although this Court has not considered the very important issues involved or the extent or limitation to be placed upon extended federal judicial supervision of state and municipal prisons and jails if such supervision is to be approved.

CONCLUSION

For the reasons stated, the questions presented by this appeal are so substantial and are of such public importance as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

It is respectfully submitted that probable jurisdiction should be noted.

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State of Alabama

GORDON MADISON
Assistant Attorney General
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Attorney for Robert K. Austin, as
Warden of the City Jail of
Birmingham, Alabama, Appellant

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CALIPH WASHINGTON,) HOSEA L. WILLIAMS, JU-) LIA ALLEN, individually and) as mother and next friend of) WILLIE ALLEN, a minor,) WILLIE ALLEN, AGNES) BEAVERS, individually and) as mother and next friend of) CECIL McCARGO, JR., a mi-) nor, CECIL McCARGO, JR.,) JOHNNIE COLEMAN, and) THOMAS E. HOUCK, JR., for) themselves, jointly and several-) ly, and for all others similarly) situated,)

Plaintiffs,)

vs.) CIVIL ACTION NO. 2350-N

FRANK LEE as Commission-) er of Corrections of Alabama;) JOHN F. BRITTON, CHAR-) LIE CASHION, HERSCHELL) LUTTRELL, DR. MAX Mc-) LAUGHLIN and WILLIAM) MITCH, as members of the) Board of Corrections of Ala-) bama; A. MELVIN BAILEY,) as Sheriff of Jefferson County,) Alabama and all other sheriffs) of Alabama, jointly and sever-) ally, who are similarly situated;) ROBERT K. AUSTIN as War-) den of the City Jail of Birming-)

ham, Alabama, and all other)
wardens and jailers of city and)
town jails of Alabama, jointly)
and severally, who are simi-)
larly situated,)
Defendants.)

Before RIVES, Circuit Judge, and LYNNE and JOHNSON, District Judges.

JOHNSON, District Judge:

ORDER

This is an action for declaratory and injunctive relief instituted by one white and five Negro citizens on their own behalf and on behalf of other persons similarly situated, pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure. The plaintiffs seek a declaration concerning the rights of Negro citizens, male and female, not to be segregated, classified, designated, or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. Further, plaintiffs assert that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. Plaintiffs ask that said statutes be declared unconstitutional and that the defendants be enjoined from requiring segregation by race in any of the state, county and city penal institutions in the State of Alabama.

Of the Negro plaintiffs, Caliph Washington is confined in the Jefferson County Jail, Jefferson County, Alabama, awaiting retrial on a capital charge; Johnnie Coleman, Willie Allen and Cecil McCargo, Jr., are confined in state penal institutions, and prior to their present incarceration had been confined under racially segregated circumstances in either city, town or county jails in Alabama; and Hosea L. Williams and Thomas E. Houck, Jr., were incarcerated in the Birmingham City Jail at the time this case was instituted.

The defendant Frank Lee is Commissioner of the Board of Corrections of the State of Alabama and as such is invested with the authority and charged with the duty of serving as the chief administrative officer of the Alabama Board of Corrections. Title 45, § 10(5), Code of Alabama, Recompiled 1958. The defendant A. Melvin Bailey is the duly elected and qualified sheriff of Jefferson County, Alabama, and as such has the legal custody and charge of the Jefferson County Jail and all prisoners committed thereto. Title 45, § 115, Code of Alabama, Recompiled 1958. The defendant Robert K. Austin is warden of the City Jail of Birmingham, Alabama, and in this capacity has the custodial duty and authority over prisoners in that jail. The defendants Bailey and Austin are sued individually and as representatives of all county sheriffs of Alabama and of all wardens and jailers of the city and town jails of Alabama.[1]

I

As noted in the complaint filed with the Clerk of this Court on February 18, 1966, plaintiffs Williams and Houck allege that they were then incarcerated in the City Jail of Birmingham, Alabama. It now appears, however, that the charges against Houck have been nol prossed and that Williams has entered a plea of guilty to the charges against him and has paid the fine imposed upon said plea. For these reasons, the defendants Austin and Bailey contend that plaintiffs have no standing to challenge any of the statutes or practices requiring segregation or relating to the segregation by race of the penal facilities of the City of Birmingham or Jefferson County. In *Singleton v. Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966), this same issue was raised in that the plaintiff had completed the actual service of his sentence. In *Singleton*, the Court set forth the general principle applicable in such instances:

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[1] In the complaint as originally filed, plaintiffs also named as defendants the individual members of the Board of Corrections of Alabama and asked that said defendants be enjoined from excluding Negroes from employment, or otherwise discriminating against Negroes in their efforts to secure employment with the Alabama prison authorities. Upon a pretrial hearing of this cause, and by agreement of counsel, this phase of the lawsuit was stricken.

The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use.

There is no question but that the evidence in this case reflects a "past use" of the penal facilities of the City of Birmingham and Jefferson County by some of these plaintiffs. As to that part of the general rule stated in *Singleton* concerning the "reasonable possibility of future use," this Court does not conceive that it is necessary that plaintiffs show an intention to violate the laws of the State of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell v. United States*, 313 U.S. 80. Under the circumstances reflected by the evidence in this case, all that it is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail and the Jefferson County Jail is that the operation of these institutions, as that operation presently exist, "permit[s] the recurrence of comparable violations." *Henderson* v. *United States*, 339 U.S. 816. In this regard, the Supreme Court of the United States in *Barrows* v. *Jackson*, 346 U.S. 249, observed that the rule against relying on the constitutional rights of another (who may be in this case presently imprisoned in either the penal facility of the City of Birmingham or of Jefferson County) is not part of the constitutional requirement of standing, but is a rule of self-restraint which the court has developed for its own governance, and, for that reason, is a mere rule of practice not to be applied where it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of competent jurisdiction[3]. See also *Ferguson* v. *Buchanan*, No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965, where the criminal prosecution against the plaintiff, who was seeking to enjoin

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[3] In this connection, defendant Austin testified that the average length of time prisoners are incarcerated in the Birmingham City Jail is from seven to fifteen days. Under such circumstances, it would be impossible for a prisoner to file and secure an adjudication on his case before he was released.

the sheriff of Dade County, Florida, from maintaining segregated facilities in the jails of Dade County, was nol prossed before the case was submitted to the district court. That court, nevertheless, found the Florida statutes that required segregation in county jails on the basis of race unconstitutional, and enjoined the defendants from operating or maintaining jails in a manner requiring segregation of the races. For these reasons, it is evident that the contention on the part of defendants Austin and Bailey that these plaintiffs do not have standing to challenge the statutes and practices requiring segregation of the races in the penal facilities of the City of Birmingham and Jefferson County is not well taken.

II

As to the contention of the defendants Austin and Bailey that they are not representative defendants of other wardens, jailers and sheriffs in the State of Alabama and, therefore, that these plaintiffs cannot maintain this action through them as representatives of "the class" within the meaning of Rule 23, Federal Rules of Civil Procedure, this Court concludes to the contrary. While it may be that the physical facilities of Jefferson County and the City of Birmingham are more elaborate and their operations more complex than many of the other jails in Alabama, this, without more, cannot serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. See *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962). It would be extremely difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent—a requirement which, as indicated, is satisfied in this case—then it becomes immaterial whether certain of these class defendants are not otherwise identically situated. 3 Moore, Federal Practice, ¶ 23.10 at 3454

(2d Ed. 1963). See *Harris* v. *Palm Springs Alpine Estates, Inc.*, supra (citing cases).[3]

III

The only defense offered to the contention that the statutes involved herein[4] violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissable inquiry by the courts. We disagree. Since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated. As stated by the Fifth Circuit in *Singleton* v. *Board of Commissioners*, supra:

> Twelve years ago, in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, the Supreme Court effectively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the State. "[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities." Johnson v. Virginia, 1963, 373 U.S. 61, 62, 356 F. 2d at 772.

Although it is true that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges

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[3] On this point this Court has serious misgivings as to the right of either the defendant Austin or the defendant Bailey to raise this particular question in this case. It appears that such a defense would, if valid, inure only to the benefit of other members of "the class" that these defendants are alleged to represent. The contention on the part of these defendants that, if they are not proper representatives of the other members of the class, venue in this district is improper as to them is without legal basis. Title 28, § 1392 (a), United States Code.

[4] The Alabama statutes that require segregation of the races in the prisons and jails of Alabama are §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

and rights, a retraction justified by the considerations underlying our penal system,'[8] it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law. *Cooper* v. *Pate*, 378 U.S. 546 (1965); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D.C. Cir. 1961). In this regard, this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances[9] prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Plaintiffs' contention that the separation of prisoners solely on the basis of race constitutes a violation of the "Cruel and Unusual" Punishment Clause of the Eighth Amendment to the Constitution of the United States is plainly without merit. There is no question but that, through the action of the Fourteenth Amendment, the Eighth applies to the states, *Robinson* v. *California*, 370 U.S. 660 (1962). However, the Cruel and Unusual Punishment Clause of the Eighth Amendment was adopted to prevent inhuman, barbarous or torturous punishment, *Black* v. *United States*, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U.S. 938 (1960); *Hemans* v. *United States*, 163 F. 2d 228 (6th Cir.), cert. denied, 332 U.S. 801 (1947); and segregation of individuals, while incarcerated, solely by reason of their race does

[8] **Price v. Johnston, 334 U.S. 266 (1948).**

[9] **For example, the "tank" used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober. According to the evidence in this case, the population of the "tank" on Saturday nights in the Birmingham jail reaches fifty or more.**

not, in the opinion of this Court, constitute cruel and unusual punishment.

IV

The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel, such as Frank Lee as Commissioner of the Board of Corrections for the State of Alabama and A. Melvin Bailey as sheriff of Jefferson County, Alabama, deserves the most careful consideration of this Court. In this connection, it is recognized that "[t]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings," *Edwards* v. *Sard*, 250 F. Supp. 977 (D.C. Dist. 1966), and in light of this recognition this Court will not at this time require an immediate and total desegregation of state, county and city penal facilities in the State of Alabama. However, the several honor farms, the educational programs, the youth centers and the hospitals in the state system must be completely desegregated immediately. All facilities in the minimum and medium security institutions, including Draper Correctional Center and Julia Tutwiler Prison for Women, must be completely desegregated within six months. As to the maximum security institutions, such as Kilby Prison and Atmore Prison, the evidence reflects that considerations of security and discipline require a more gradual desegregation. In this connection, the Court will expect complete and total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year. As to the county and city systems, complete desegregation should be achieved within six months in all areas, including quarters, except in very exceptional instances as, for example, in the use of the "tank" mentioned previously.

No plan of desegregation will be required of any of these defendants. However, since it is the function and duty of the Board of Corrections for the State of Alabama, and particularly the Commissioner thereof, pursuant to §§ 3, 7, 10(1), 10(5), 10(8) and 11, to inspect and generally supervise every county and municipal jail or prison in any incorporated town and city

in the State of Alabama having ten thousand or more population, this Court will require the Commissioner of the Board of Corrections to supervise not only the desegregation of state penal facilities as herein ordered, but also the desegregation of the jails in the counties throughout the State of Alabama and in all towns and cities throughout the state. The Commissioner of the Board of Corrections will be required to report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and the county and city jails, and other penal facilities throughout the State of Alabama.

In view of the declarations herein made concerning the unconstitutionality of the state statutes in question to the extent that those statutes require segregation of the races solely by reason of their color, and with the further declarations as to the unconstitutionality of the practice of segregating prisoners in any of the state, county or city penal facilities solely by reason of race, and the declarations concerning the duty of appropriate officials to take the necessary steps within the periods herein indicated, this Court does not consider it necessary to issue a formal injunction in this case at this particular time. However, there should be no misunderstanding on the part of any of the officials involved concerning the duty imposed upon them by the law generally and by this order specifically to cease the practice of arbitrarily segregating the races in the state, county and city penal facilites. The officials of the State of Alabama, whether they be concerned with the state penal facilities or the county and city penal facilities, have an affirmative duty and responsibility to effect desegregation of these facilities in accordance with this decree. Jurisdiction of the case will be specifically retained for all purposes.

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, be and are, in each instance, declared violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama.

It is further ORDERED that the defendant Frank Lee as Commissioner of the Board of Corrections for the State of

Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year from the date of this decree.

It is further ORDERED that the defendant A. Melvin Bailey as sheriff of Jefferson County, Alabama, and each sheriff of each county in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the county jails and any other penal facilities and operations that may be maintained by any such county, within a period of six months from the date of this decree.

It is further ORDERED that the defendant Robert K. Austin as warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree.

It is further ORDERED that the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama.

It is further ORDERED that each sheriff and each warden in the counties, cities and towns in the State of Alabama furnish the Commissioner of the Board of Corrections for the State of Alabama such reports and information that may be required by said Commissioner in the discharge of his duty to report to this Court.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the defendants, but the Court is of the opinion that the State of Alabama should pay the costs for the defendants.

Done, this the 12th day of December, 1966.

RICHARD T. RIVES
United States Circuit Judge

SEYBOURN H. LYNNE
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

APPENDIX "B"

Section 4, Title 45

Code of Alabama, Recompiled 1958

"4. *Authority as to tubercular patients, and management of hospitals.*

The state department may also make such changes in the existing arrangements with reference to the segregation and treatment of tubercular patients, and other patients needing long time hospital detention and care, who are serving sentences for conviction of crime, so as to permit such patients to be transferred to the custody and care of those officers and agents who have the charge and control of the detention hospital or hospitals of the state convict system; the agents in charge of such hospital or hospitals during the period of the treatment of such convict patients are constituted the legal custodians of such convicts. Any such hospital or hospitals, or other places suitable and used under the convict system for the segregation and treatment of tubercular or long time patients may be opened under the authority of the state department and may be used for the segregation treatment and care of other inmates afflicted with tuberculosis or other diseases or ailments requiring long time detention, treatment and care, and who may be received from any other institution covered by this article, or from any hospital or other duly accredited and responsible institution in the state with which the state department may co-operate in the matter of the treatment or care of such patients. There shall be proper separation of convicts from free persons, whites from blacks, males from females, in such hospital or place of detention. The department is given general authority over the reception, care, custody and segregation of such persons, and is also vested with the power and authority, by and with the approval of the governor, to establish and promulgate rules and regulations for the proper conduct of the business and operation of such hospitals and places of detention, except as may be otherwise provided by this article."

Section 52, Title 45

Code of Alabama, Recompiled 1958

"52. (3643) (6547) (4493) (4658) *Males and females not worked or confined together; nor whites and blacks.*

It shall be unlawful for white and colored convicts to be chained together or to be allowed to sleep together; and it shall be unlawful to chain together or to confine together in the same room or compartment, male and female convicts. Whenever in the judgment of the governor and the director, it is practicable to do so, arrangements shall be made for keeping white and colored convicts at separate prisons and they shall not be allowed to be kept at the same place."

Section 121, Title 45

Code of Alabama, Recompiled 1958

"121. (4806) (7196) (4951) (4540) (4491) (3789) (241)

What prisoners kept separate.

Men and women, except husband and wife, must not be kept in the same room; and white and colored prisoners, before conviction, must also be kept separate and apart, if there be a sufficient number of apartments for that purpose."

Section 122, Title 45

Code of Alabama, Recompiled 1958

"122. (4856) *Prisoners separated by race and sex.*

It shall be unlawful for any sheriff, or jailer, or other keeper of the jail or the town or city prison, to confine in the same room or apartment of any jail or prison white and Negro prisoners; and men and women, except husband and wife, must not be kept in the same room or apartment."

Section 123, Title 45

Code of Alabama, Recompiled 1958

"123. (3722) (6619) (4557) (3755) (4321) *Imprisoning together white and colored prisoners before conviction.*

Any jailer or sheriff, having the charge of white and colored prisoners before conviction, who imprisons them permanently together in the same apartment of any jail, or other place of safe keeping, if there is a sufficient number of apartments to keep them separate, must, on conviction, be fined not less than fifty nor more than one hundred dollars."

Section 172, Title 45

Code of Alabama, Recompiled 1958

"172. (4866) *Janitor service and bathing facilities.*

The court of county commissioners, board of revenue, or city council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails; shall provide bathing facilities separate for Negroes and whites, males and females, soap and towels, hot and cold water, clean and sufficient bedding, and with clean clothes when the prisoners are not able to provide them."

Section 183, Title 45

Code of Alabama, Recompiled 1958

"183. (4877) *Size, etc., of jail, etc.*

Each county jail, or town or city prison, must be of sufficient size and strength to contain and keep securely the prisoners confined therein; and must contain at least four separate apartments, one for white men, and one for white women, one for Negro men, and one for Negro women. It shall be fireproof, properly ventilated, sufficiently lighted, by day and night, adequately heated, containing adequate sanitary plumbing, and sewerage connections, including separate bath facilities for whites and Negroes."

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1205~~ 75

FRANK LEE, as Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,
Appellants

v.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR., *Appellees*

On Appeal From the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a Three-Judge District Court

MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1208

FRANK LEE, as Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,
Appellants

v.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR., *Appellees*

On Appeal From the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a Three-Judge District Court

---

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on December 12, 1966, by the U.S. District Court for the Middle District of Alabama, specially constituted as a three-judge court pursuant to 28 U.S.C. § 2281, declaring unconstitutional §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, recompiled 1958, and ordering the desegregation of state penal facilities, county and municipal jails.

Appellees instituted this suit as a class action on February 18, 1966, alleging that provisions of Alabama law requiring the separation, classification or designation of prisoners on the basis of race were facially unconstitutional and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution of the United States.

The final order of the U.S. District Court for the Middle District of Alabama, Northern Division, rendered December 12, 1966, reported at 263 F. Supp. 327 (1966), is set out in full in the Appendix to Appellants' Jurisdictional Statement and is incorporated herein by reference thereto. The District Court declared §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, recompiled 1958, to be in violation of the Fourteenth Amendment of the Constitution of the United States to the extent that they require segregation of the races in the prisons and jails of Alabama. The District Court ordered the total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year, and as to the county and city jail systems a completed de-

segregation within six months, in all areas, including quarters. Very exceptional instances such as, for example, the use of the "drunk tank," were excluded from the order. The appellant Frank Lee (a defendant below), as Commissioner of the Board of Corrections for the State of Alabama, was ordered to take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system. To effect the complete desegregation of the minimum and medium security institutions, as operated by the state penal system, six months were provided. The defendants were also ordered to take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year. Appellant Robert K. Austin (a defendant below) and each warden in each town and city in the State of Alabama were ordered to take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that are maintained by any such town or city, within a period of six months. The appellant Lee as the Commissioner of the Board of Corrections for the State of Alabama was ordered to supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to the Court every three months concerning the steps being taken and the progress being made in state penal institutions and county and city jails and other penal facilities.

Notice of Appeal was filed by defendant Frank Lee as Commissioner of the Board of Corrections of Alabama and the defendant Members of the Board of Corrections of Alabama, on February 6, 1967.

Notice of Appeal was filed by Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, on February 8, 1967.

Defendant A. Melvin Bailey, sued as Sheriff of Jefferson County, Alabama, and as representative of the State's other sheriffs, filed no appeal.

ARGUMENT

The decision of the District Court is plainly correct. A state cannot constitutionally require the racial segregation of public facilities. See, e.g., *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Johnson* v. *Virginia,* 373 U.S. 61 (1963); *Cooper* v. *Pate,* 378 U.S. 546 (1965); and *Singleton* v. *Board of Commissioners,* 356 F. 2d 771, 772 (1966). In *Singleton, supra,* the United States Court of Appeals for the 5th Circuit extended the principle of *Brown* v. *Board of Education, supra,* to include penal or correctional facilities. See also *Edwards* v. *Sard,* 250 F. Supp. 977 (D. C. 1966).

That the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States follow appellees into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law is too settled for argument. *Cooper* v. *Pate,* 378 U.S. 546 (1965); *Cochran* v. *Kansas,* 316 U.S. 255 (1942); *Sewell* v. *Pegelow,* 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee,* 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer,* 295 F. 2d 171 (D.C. Cir. 1961).

Appellants claim that racial violence will result from integration. It is well settled that the threat of racial

violence cannot justify the denial of constitutional rights. *Cooper* v. *Aaron,* 348 U.S. 1 (1958).

Appellants insist that the District Court has usurped "prison management" and the "supervisory authority" of prison officials. In the matter of racial segregation, prison officials have had no "authority" whatsoever. Alabama's statutes themselves eliminated all discretion.

Appellants claim that appellees lack proper standing to sue. Appellees have standing on the basis of the decisions in *Mitchell* v. *U. S.,* 313 U.S. 80 (1941); *Henderson* v. *U. S.,* 339 U.S. 816 (1950); *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Singleton* v. *Board of Commissioners, supra;* and *Ferguson* v. *Buchanan,* No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965.

Appellant Austin fulfills the requirements of Rule 23 of the Federal Rules of Civil Procedure. The questions of law and fact are common as to him and the members of the class he represents. The locations and the physical facilities of the jails in question, without more, are basically irrelevant to a determination of the applicable law. *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax,* 313 F. 2d 284 (5th Cir. 1963); and *Sims* v. *Frink,* 208 F. Supp. 431 (M. D. Ala. 1962) aff'd *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

We respectfully submit, therefore, that the appellants present no substantial question for the decision

of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. ~~1208~~ 75

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON,, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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Birmingham, Alabama, Appellant

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 1208

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON,, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

STATEMENT

The Final Order of the United States District Court for the Middle District of Alabama, Northern Division, from which the Appellants appeal is set out as Appendix "A" of Appellants' Jurisdictional Statement, at pages 13 through 23 thereof. Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, held invalid by the District Court, are set out at pages 24 through 26 of said Jurisdictional Statement. Said Final Order and said Code sections are incorporated herein by reference thereto.

If this Court should conclude that said Code sections are, on their face, unconstitutional, and the decision of the District Court is to be affirmed insofar as the validity of said sections is concerned, the Appellants take the position that this case nevertheless presents other questions of substantial and public importance as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

ARGUMENT

The Appellees in their Motion to Affirm state that the "... due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States follow Appellees into prison and protect them from unconstitutional action on the part of prison authorities carried out under color of State law ..." The cases heretofore decided by this Court, and cited by Appellees to sustain their position, do not so hold. *Cooper vs. Pate*, 378 U.S. 546 (1965), so cited, merely holds that a State prisoner's claim that because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners should not be dismissed without a hearing. No question of prison discipline and internal security is presented by the pleadings presented to this Court. This Court necessarily held that on a motion to dismiss the Court must take the allegations of the pleadings as true. It does not follow that upon the presentation of an answer setting up prison discipline and internal security as an explanation or defense for the said action of the prison officials this Court would subordinate prison discipline and security to *Cooper's* alleged constitutional rights which he would enjoy were he not a prisoner.

The other Supreme Court case cited by Appellees is *Cochran vs. Kansas*, 316 U.S. 255 (1941). The *Cochran* case grew out of a habeas corpus proceeding and at issue was the right of the State of Kansas to imprison Cochran under the sentence imposed. Such a proceeding by a prisoner has long been recognized and is not disputed. It is no authority for any issue

in this case. The *Cochran* case clearly did not involve any issue of prison discipline and security.

The very fact that the Appellees can cite no other cases of this Court on the extent to which constitutional rights follow a prisoner into prison sustains the Appellants in their request that this Court set this appeal down for consideration on briefs and oral argument. Certainly, neither *Cooper, supra,* nor *Cochran, supra,* furnishes any guide to a full answer to this very important question.

In taking this Appeal the Appellants are not unmindful of the decision of the United States District Court of the District of Columbia, reported in *Edwards vs. Sard,* at 250 F. Supp. 977, wherein the District Court stated that " . . . the plaintiffs in this case will prevail in their suit if they convince the court that a policy of racial discrimination has been followed in making dormitory assignments at Lorton (a reformatory)." Neither do we overlook the decision of the Fifth Circuit Court of Appeals in the case of *Singleton vs. Board of Commissioners of State Institutions, et al.,* 356 F. 2d 771, wherein the Circuit Court opined that " . . . the Supreme Court effectively foreclosed the question of whether a State may maintain segregated schools. The principle extends to all institutions controlled or operated by the state. It is no longer open to question that a state may not constitutionally require segregation of public facilities. *Johnson vs. Virginia,* 1963, 373 U.S. 61, 62, 83 S.Ct. 1053, 1054, 10 L.Ed. 2d 195."

Edwards vs. Sard, supra, the District Court case referred to above, involved dormitory housing at a Federal Reformatory of the District of Columbia. The ratio of Negroes and whites at Lorton was about ten Negroes to one white. Of the twenty-two dormitories at Lorton only six were integrated. In *Edwards, supra,* Mr. Charles M. Rogers, Deputy Superintendent of Lorton, who is in charge of making dormitory assignments and is himself a Negro, testified that he considered the race of prisoners as one factor in deciding which dormitory to assign them to. The *Edwards* case cited above also indicates that Mr. Thomas R. Sard, Director of Corrections, considered

race as material in the assignment of dormitory space to prisoners. The District Court in this case, in its opinion stated that " . . . Mr. Sard indicated a sincere awareness of the desirability of achieving the greatest possible intermingling of the races consistent with the *security of the institution.*" (Emphasis added) To further show the relation of race and prison security, Mr. Sard, in the *Edwards case, supra,* testified as follows: "We would like very much to have every dormitory we have integrated if we had a sufficient proportion of white to Negro to do this *safely.*" (Emphasis added) Note, in *Edwards, supra,* bottom of page 980, 250 Fed. Supp., the Court granted judgment for the defendants after it found in effect that the procedures at Lorton (although only six of twenty-two dormitories were integrated and race was considered in the assignment of prisoners) were satisfactory, they being "consistent with the security of the institution."

Singleton vs. Board of Commissioners of State Institutions, 356 F. 2d 771, decided by the Fifth Circuit and referred to above, involved only the reform schools of the State of Florida. Said case primarily involves the question as to whether the case had become moot. It does not discuss prison security. In fact, said case did not involve a prison but involved reform schools. The plaintiffs were being educated in the schools. It was alleged that certain courses and recreational facilities available to white children were not available to Negro children. In view of the posture of said case, the application by the Fifth Circuit of *Brown vs. Board of Education of Topeka,* 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 878, is not without plausible argument. However, we submit that it is not persuasive authority for consideration in this case against the Appellants, since it does not involve or determine the question of "prison security," which must be considered in passing upon claimed constitutional rights of prisoners.

When a prisoner is placed in jail, he has only such rights, including constitutional rights, as will not impair prison discipline or internal security. *Sostre vs. McGinnis,* 334 F. 2d 906, *cert. den.* 85 S.Ct. 168, 379 U.S. 892, 13 L.Ed. 2d 96.

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland*, 337 F. 2d 72.

The right to receive letters in prison may be limited. *United States vs. Illinois, et al.*, 343 F. 2d 120.

Religious Freedom, a constitutional right, may be limited in prison. *Sostre vs. McGinnis*, 334 F. 2d 906, *cert. den.*, 85 S.Ct. 168.

The attendance at a prison school may be denied. *United States vs. Pate*, 229 F. Supp. 818.

The right of a prisoner to receive mail yields to the requirement of maintaining internal discipline of prison. *United States vs. Fay*, 197 F. Supp. 855.

In *Jones vs. Willingham*, 248 F. Supp. 791, the Court in its decision sets out some important principles relating to rights of a prisoner as follows:

> "Imprisonment carries with it many restrictions. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). '*A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline.*' Sostre v. McGinnis, 334 F. 2d 906, 908 (2d Cir., 1964), cert. denied, 379 U.S. 892, 85 S.Ct. 168, 13 L.Ed. 2d 96 (1964). '(E)xcept in extreme cases, the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline * * * .' Childs vs. Pegelow, 321 F. 2d 487, 491 (4th Cir., 1963), cert. denied, 376 U.S. 932, 84 S.Ct. 702, 11 L.Ed. 2d 652 (1964). One committed to prison, however, does not on entering the place of his confinement leave his constitutional rights at the gates. Pierce v. LaVallee, 293 F. 2d 233 (2d Cir., 1961). The issue here may be stated as it was in the Pierce case:

> "' * * * Either the plaintiffs were punished solely because of their religious beliefs or they were not. If they were, the defendant's conduct violates * * * the United States Constitution. If the plaintiffs were punished for legitimate reasons * * * (the) law is (not) violated' l.c. 235-236." (Emphasis added)

In *Price vs. Johnston*, 1948, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356, this Court recognized the general rule of law that:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system."

From the above decisions it is clear that in dealing with alleged rights and claims of prisoners the courts have held that the dominant issue to be determined is not whether such alleged rights or claims are bottomed upon constitutional provisions, but if so bottomed what effect, if any, will the recognizing or granting thereof have upon prison discipline and security. The Appellants have not found and the Appellees have not cited any federal case where prison discipline and security was considered and subordinated to any claimed constitutional right. The very nature of a prison requires that prison discipline and security be dominant.

The Appellants contend that the Plaintiffs have no right to ask the court to substitute the judgment of the court as to prison discipline and security for the judgment of the prison administrators, who are responsible therefor.

The importance of not disturbing the determination of prison officials as to prison discipline and security was forceably recognized by the United States Court of Appeals for the Seventh Circuit in *Walker vs. Pate*, 1966, 356 F. 2d 502, where the court held that prisoner's various complaints as to his not being permitted to keep some law books and to receive visits

by his wife and daughter were matters within scope of prison's discipline and security, and did not state a claim under the Sixth and Fourteenth Amendments or Federal Civil Rights Act. In this case, the opinion set out for the benefit of inmates of state prisons within the Seventh Circuit the following:

> "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts . . . A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in volation of his constitutional rights."

An individual warden or jailer owes a duty to a prisoner placed in his custody to keep the prisoner safely and free from harm according to *Cohen vs. United States*, 252 F. Supp. 679 (1966). If the duty to keep a prisoner free from harm is in the warden and the jailer, should not they rather than the federal courts determine what is reasonably necessary to insure such safety? The importance of this is made crystal clear when we consider that in the *Cohen case, supra*, an award of $110,000 to the prisoner was approved by the District Court because of the negligence of prison administrators in permitting prisoner Cohen to be assaulted by a fellow inmate and seriously injured while in prison. The duty is on the wardens and jailers to safeguard prisoners in their jails. This being so, a court should not grant an injunction against a warden or jailer which injunction, if granted, will decrease the safety of prisoners and jail personnel.

CONCLUSION

The Appellants respectfully submit that should the said sections of Title 45, Code of Alabama, Recompiled 1958, set

out at pages 24 through 26 of the Appellants' Jurisdictional Statement, and held invalid on their face by the District Court, be likewise held invalid by this Court, such holding should not result in a summary affirmance in full of the Final Order appealed from, but that this case should be set down for plenary consideration, with briefs on the merits and oral argument for resolution as to the extent, if any, to which prison administrators may in the absence of statute segregate prisoners according to race when in their judgment it is reasonably necessary to so segregate in order to maintain prison discipline and security. Should said state statutes be held invalid on this appeal, it will still be of very great importance to the public and prison officials throughout this nation for prison administrators to know the limits of their authority in the absence of such statutes to require some racial segregation or full racial segregation in their jails, the extent thereof to be determined by the reasonable judgment of such prison administrators who are directly responsible for the safety of their prisons.

The Appellants say that the questions presented by this Appeal are so substantial and are of such public importance as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

— VS —

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT.

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Birmingham, Alabama, Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

— VS —

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

BRIEF FOR APPELLANTS

OPINION BELOW

The Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a Three-Judge District Court, from which this appeal is taken (R. 123-134) is reported at 263 F. Supp. 327 and is set forth in full in Appendix A to this brief.

JURISDICTION

The judgment of the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a

Three-Judge District Court, was rendered on the 12th day of December, 1966 (R. 123-134), 263 F. Supp. 327. On the 6th day of February, 1967 certain defendants in the court below (Appellants here), namely Frank Lee, as Commissioner of Corrections of Alabama; John F. Britton, Charlie Cashion, Herschell Luttrell, Dr. Max McLaughlin and William Mitch, as Members of the Board of Corrections of Alabama, took an appeal to the Supreme Court of the United States from said final order of December 12, 1966 (R. 134-137). On the 8th day of February, 1967 Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, a defendant in the Court below (an Appellant here), took an appeal to the Supreme Court of the United States from said final order of December 12, 1966 (R. 137-139). Each of said appeals were taken pursuant to 28 U.S.C., Section 1253. Probable jurisdiction was noted by this Court in its order of May 29, 1967 and this case placed on the summary calendar (R. 210). Jurisdiction to review by appeal an order granting or denying a permanent injunction in any civil action, suit or proceedings required by an act of Congress to be heard and determined by a district court of three judges, is conferred upon this Court by 28 U.S. Code, Section 1253. That such a jurisdiction exists in the circumstances of this case is sustained by the following authorities: *Radio Corporation of America vs. United States*, 341 U.S. 412; *Florida Lime & Avocado Growers, Inc. vs. Jacobsen*, 362 U.S. 73.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and Rule 23, Federal Rules of Civil Procedure. Also involved in this case are Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958. Each of said sections are set out separately in Appendix B of this Brief.

QUESTIONS PRESENTED

The Appellees (plaintiffs in the court below), each of whom is a prisoner or former prisoner of a state, county or city jail in the State of Alabama, claim a right not to be segregated, classified, designated or otherwise subjected to racial distinction

in confinement in the state penal system and in the county, city and town jails of the State of Alabama. The Appellees also asserted in their complaint that various statutes enacted by the Legislature of the State of Alabama requiring segregation by race in the state, county and city penal facilities are unconstitutional. Said statutes are as follows: Sections 4, 52, 121, 122. 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958 (set out in Exhibit B of this Brief).

The Appellants (defendants in the Court below) deny the claims of Appellees and say that the separation of Negro and white prisoners in the prisons and jails of Alabama to the extent that such separation exists is for reasons of internal security of the prisons and jails and to protect the prisoners, jailers and others from bodily harm.

The questions presented are:

"1. Do state statutes which require the separation of white and Negro prisoners in state penal institutions and county and city jails violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Does a prisoner serving a penitentiary sentence have the constitutional right to question the validity of state statutes requiring the separation of prisoners by race?

3. Does the District Court have jurisdiction and authority to require the defendant Commissioner of Corrections of Alabama to supervise the desegregation of all penal state facilities, including cities of under ten thousand population where state statutes invest authority in the said Commissioner only as to cities over ten thousand population?

4. Are Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require the segregation of the races in the prisons and jails of Alabama?

5. Does the District Court have authority to order the defendant Frank Lee, as Commissioner of the Board of Corrections, to make reports to the court every three months, beginning March 15, 1967, as to the steps taken and progress made to eliminate segregation in the state penal institutions and the county and city jails in the State of Alabama?

6. Do the plaintiffs in this case have standing to challenge any of the statutes or practices requiring segregation, or relating to the segregation by race of the penal facilities of the City of Birmingham?

7. Is the appellant Austin (a defender below) representative of other wardens and jailers of city and town jails of Alabama to the extent that plaintiffs may maintain this action against said Austin as representing a class composed of all other city wardens and jailers in Alabama under Rule 23, Federal Rules of Civil Procedure?

8. Does a Negro prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the white race where such warden is not compelled to do so by statute?

9. Does a white prisoner have a constitutional right to prevent the warden of a jail from confining such prisoner with other prisoners of his own race to the exclusion of prisoners of the Negro race, where such warden is not compelled to do so by statute?

10. Does the Order appealed from unduly restrict the exercise of lawful discretion on the part of state prison officials in the administration of the prisons?"

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on December 12, 1966 by the U. S. District Court for the Middle District of Alabama, specially constituted as a three-judge court pursuant to 28 U.S.C. §2281, declaring unconstitu-

tional Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, and ordering the desegregation of state penal facilities, county and municipal jails.

Appellees instituted this suit as a class action on February 18, 1966, alleging that provisions of Alabama law requiring the separation, classification or designation of prisoners on the basis of race were unconstitutional and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution of the United States.

The final order of the U. S. District Court for the Middle District of Alabama, Northern Division, (R. 123-134) was rendered December 12, 1966, is reported at 263 F. Supp. 327 (1966), and is set out in full in Appendix A of this brief. The District Court declared Sections 4, 52, 121, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, to be in violation of the Fourteenth Amendment of the Constitution of the United States to the extent that they require segregation of the races in the prisons and jails of Alabama (R. 132). The District Court ordered the total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year, and as to the county and city jail systems a completed desegregation within six months, in all areas, including quarters. Very exceptional instances such as, for example, the use of the "drunk tank", were excluded from the order (R. 129). The appellant Frank Lee (a defendant below), as Commissioner of the Board of Corrections for the State of Alabama, was ordered to take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system, and to effect the complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months (R. 132). The defendants were also ordered to take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year (R. 132, 133). Appellant Robert K. Austin (a defendant below) and each warden in each town and city in the State of Alabama were ordered to take the necessary and appropriate steps to completely desegregate the town and city jails, and any

other penal facilities and operations that are maintained by any such town or city, within a period of six months (R. 133). The appellant Lee, as the Commissioner of the Board of Corrections for the State of Alabama, was ordered to supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to the Court every three months concerning the steps being taken and the progress being made in state penal institutions and county and city jails and other penal facilities (R. 133).

Notice of Appeal was filed by defendant Frank Lee, as Commissioner of the Board of Corrections of Alabama, and the defendant Members of the Board of Corrections of Alabama, and on February 6, 1967 (R. 134-137). Notice of Appeal was filed by Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, on February 8, 1967 (R. 137-139). Probable jurisdiction of the Appeal was noted by this Court in its Order of May 29, 1967, and this case placed on the summary calendar (R. 210).

The Appellees (plaintiffs in the Court below) placed on the stand only one witness, Mr. John O. Boone, an employee of Southern Regional Council, a human relations agency with headquarters located in Atlanta, Georgia (R. 145). Mr. Boone testified that he held an A.B. degree from Morehouse College and a Master of Social Work degree from Atlanta University (R. 146). Mr. Boone is a former employee of the federal prison system, having been employed for approximately fourteen years at the Atlanta federal penitentiary (R. 146). Mr. Boone testified that in his opinion desegregation of prisoners could be accomplished without difficulty if "properly managed" (R. 147). Mr. Boone further testified that desegregation of the Atlanta federal penitentiary was started in 1951 and completed last year (1965) (R. 149); that his experience was entirely in the federal prison system and that he had not visited any Alabama prison (R. 152, 153); that in his opinion race is not a relevant characteristic under any set of circumstances for the purposes of assignment of either work, dormitory space or otherwise in a penal institution (R. 154); that he disagreed with the opinions of Mr. Charles M. Rogers, Deputy Superintendent of Lorton Penitentiary, Mr. Thomas R. Sard, Director of Corrections for the District of Columbia, and Superintendent Kermit A. Weakley of Lorton Penitentiary, that race is a factor to be considered in assignment of prisoners to dormitories and that interracial mixing should be

accomplished to the extent that such can be done " - - - and maintain the security and safety of the institution" (R. 155, 156). The opinions referred to above relating to Lorton Penitentiary are reflected in *Edwards v. Sard*, 250 Fed. Supp. 977 (D.C. Dist. 1966). After having testified that in the desegregation of prisons race is not a relevant characteristic "under any set of circumstances" (R. 154), Mr. Boone, the only witness for the Appellees testified on cross-examination that in his opinion there were circumstances when desegregation would present some difficulty as follows: "Now, if the atmosphere is poor, if management is not ready for it, if the people and you—and if the process of desegregation is handled poorly, why, yes, you would have some difficulty possibly" (R. 156).

THE STATE PRISON SYSTEM

The Alabama Prison System consists of two prisons for men, one honor camp, a correctional center, a youth center, a cattle ranch, a trusty barracks, a prison for women, and approximately 25 highway road camps, in all of which about 1,500 white and 2,500 colored prisoners are kept. Of these institutions, only the youth center, the cattle ranch and the highway road camps are segregated. Members of both races are assigned at all of the other institutions.

In those institutions to which members of both races are assigned, Negroes and whites do not sleep together or eat together or, generally speaking, use the same facilities at the same time although they may use the same facilities at different times. One exception to this is the Kilby Prison Hospital where the tubercular ward is integrated. White and colored prisoners do work together and there is some joint recreation.

With the exception of the Commissioner, two deputy commissioners and administrative assistants all personnel employed by the Board of Corrections are employed from a list of those who have passed the State Merit System examination for their particular classification of employment. These examinations are supervised by the State Personnel Board whose practices are not here challenged. At present, all employees of the Board are white.

JEFFERSON COUNTY JAILS

The facilities of Jefferson County jails are used interchangeably by both races but not on an intermixed basis (R. 189). Religious services are integrated (R. 187). The sheriff of Jefferson County, Alabama, testified that there are situations in the Jefferson County Jail where it is desirable to segregate some prisoners from others on the basis of race (R. 187).

THE BIRMINGHAM CITY JAIL

In relation to the Birmingham City Jail, the record shows the following: The prisoners in this jail are short-term prisoners which total about two thousand prisoners per month (R. 192). The average daily jail population is from three to four hundred (R. 192). The average stay per prisoner in the jail is about seven to fifteen days (R. 192, 193). There are some areas of the jail operated on an integrated basis, such as the trustees, farm work crews, concrete pipe work crew, and maintenance crew (R. 193). Prisoners are assigned to a duty that they are capable of performing, regardless of race (R. 193). The prisoner problems at a city jail such as the Birmingham City Jail are different from those which would be experienced by prisoners such as Kilby (a state penitentiary) or the Atlanta federal penitentiary (R. 194). Over fifty per cent of the Birmingham City Jail prison population came there as a result of the use of alcohol or alcoholic beverages and are in a drunken condition when received (R. 194). This definitely presents a problem in the matter of security and discipline of the prison (R. 194). To put Negro prisoners and white prisoners together in the "drunk tank" at the jail would aggravate prison security problems, and be a hazard to the safety of the prisoners (R. 194). The Birmingham City Jail has a large "bull pen" for Negro drunks and another large "bull pen" for white drunks (R. 195). In addition to the "bull pens," there are eight individual cells used to hold drunks when needed, but there are so many drunks coming in that the ones placed in the cells cannot be kept there for as long as prison officials would like (R. 195). White prisoners and Negro prisoners have separate visiting times (R. 196) due to the limited visiting space. In the Birmingham City Jail the separation of Negro and white prisoners, to the extent that such separation exists, is because, in the opinion of the Warden of the Jail (Appellant Austin), such separation is necessary to

maintain the internal security of the prison and to protect the prisoners and others from bodily harm (R. 96). No segregation of prisoners according to race at the Birmingham City Jail is presently employed except as is necessary in the opinion of the Warden to maintain the internal security of the prison and protect the prisoners and others from bodily harm (R. 96, 97). The Warden of the Birmingham City Jail furnishes the Chief of Police of the city monthly a report which lists by color, sex and age the number of prisoners confined in said City Jail according to offense charged (R. 97). The report for May, 1966, which was attached to the answer to interrogatories, shows a total of 2,021 prisoners for that month (R. 97, R. 104-118).

SUMMARY OF ARGUMENT

I.

NO ORDER OR DECREE SHOULD BE SUSTAINED ON THE BASIS OF A CLASS ACTION WHEREBY THE WARDEN OF THE LARGEST CITY IN THE STATE OF ALABAMA IS NAMED AS A REPRESENTATIVE OF ALL OTHER WARDENS AND JAILERS OF CITY AND TOWN JAILS OF ALABAMA.

There is no authority under Rule 23, Federal Rules of Civil Procedure, or otherwise, to make Appellant Austin a representative defendant of all wardens and jailers of city and town jails, both large and small, in Alabama. No evidence was offered which showed a similarity between Birmingham City Jail and other city and town jails in Alabama. Prison discipline and internal security is of paramount importance in a prison or jail. The problems of the Birmingham City Jail may not be comparable to the smaller city and town jails of Alabama. If a class action was to be maintained, there should have been several different population classifications of cities and towns and a representative warden selected from each classification.

II.

STATE STATUTES REQUIRING THE SEPARTION OF PRISONERS BY RACE IN STATE, COUNTY, CITY AND TOWN JAILS IN THE STATE OF ALABAMA ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The primary purposes of a jail are (1) to punish a convicted offender, (2) to serve as a deterrent to the commission of other crime or offenses by such offender or others, and (3) to safeguard society by separating therefrom persons of criminal inclinations who have been convicted of particular crimes or offenses. The proportion of violent and hostile individuals in a prison or jail population is far greater than the proportion of such persons in the general population. The same rules relating to race which have been judicially applied since 1954 to public parks, schools and similar public facilities are not applicable to and should not be applied to prisons and jails. This Court has held that if any state of facts reasonably can be conceived that will sustain a statute, the statute should be sustained by this Court. *Allied Stores of Ohio, Inc. vs. Bowers,* Ohio 1959, 358 U.S. 522, 3 L. Ed. 2nd 480, 79 S. Ct. 437. In *Alabama State Federation of Labor vs. McAdory,* 325 U.S. 450, 89 L.Ed. 1725, 65 S. Ct. 1384, this Court held that where a statute is assailed as unconstitutional the Court *must* assume the existence of any state of facts which would sustain the statute. A statute should not be struck down if it is within the State's consitutional power, even though it may approach the verge of that power. *Everson vs. Board of Ed. of Ewing Tp.,* 330 U.S. 1, 91 L.Ed. 711, 67 S. Ct. 504, 168 ALR 1392, reh. den. 330 U.S. 855, 91 L.Ed. 1297, 67 S. Ct. 962.

Certainly, there existed facts which were available to the legislature enacting said statutes and which exist today relating to the integration of the races in prisons and jails of Alabama which indicated then and even today that such integration would adversely affect prison discipline and internal security.

III.

THE MAINTENANCE OF DISCIPLINE AND INTERNAL SECURITY IN A PRISON IS MOST IMPORTANT TO SOCIETY, PRISON PERSONNEL AND THE INMATES THEREOF AND THE EXERCISE OF REASONABLE ADMINISTRATIVE DISCRETION THEREIN SHOULD NOT BE HAMPERED BY INFLEXIBLE JUDICIAL ORDERS, EVEN IF THE EXERCISE OF THAT DISCRETION RESULTS IN SOME SEGREGATION OF THE RACES.

Even if this Court should hold the statutes involved in this case invalid, it does not follow that the determination of what is necessary to maintain discipline and internal security in a prison even in the area of race should not be left to the prison administrators best qualified to make such a determination.

Walker vs. Pate, 356 F. 2d 502, denotes the importance of prison discipline and security in words as follows:

> "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts . . .. A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights."

A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline or internal security; *Sostre vs. McGinnis*, 334 F. 2d 906, 908, cert. den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168. Who should determine which so-called rights will or will not impair the requirements of prison discipline? We respectfully suggest that the prison administrators of a particular prison determine which so-called rights may be granted the inmates of that prison since they are in a better position to make a determination in the matter than the courts.

In *Price vs. Johnson*, 334 U.S. 266, 285, 92 L.Ed. 1356, 68 S. Ct. 1049, 1060, this Court stated that:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland*, 337 F. 2d 72.

The right to receive letters in prison may be limited, *United States vs. Illinois, et al.*, 343 F. 2d 120, and yields to the require-

ment of maintaining internal discipline of prison. *United States vs. Fay*, 197 F. Supp. 855.

Religious freedom, a constitutional right, may be limited in prison. *Sostre vs. McGinnis*, 334 F. 2d 906, cert. den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

The attendance at a prison school may be denied. *United States vs. Pate*, 229 F. Supp. 818.

The order of the three-judge court from which this appeal is taken places in the court detailed supervisory authority over prison officials in the administrative management of their prisons insofar as such management relates to race. This order dilutes prison officials' authority to maintain prison discipline and security where race is a factor and can result in procedures being adopted because such order seems to so demand rather than being adopted solely with a view of what is best for prison discipline and security in a particular prison or jail.

It is important that state and city prison officials be permitted to manage and regulate their prisons, and separate, segregate and assign prisoners all as seems to them is in the best interest of prison discipline and security, without regard to ordered directions from a Federal Court.

We respectfully suggest that the Fourteenth Amendment does not require the federal courts to affirmatively promote and require the integration of prison and jail activities and facilities as the District Court intends to do under the order and decree appealed from. A prisoner loses many rights when he enters a prison, including some constitutional rights. Such is the nature of imprisonment.

We respectfully ask this Court to hold that the separation of the races in a prison or jail by administrative officials in charge of such prison or jail, when they are of the opinion that such separation will aid in maintaining discipline and prison security, is not a violation of any constitutional right of a prisoner, either Negro or white. To hold otherwise will involve federal courts throughout this nation in minute supervision of prison management in this area, and would pre-empt the exercise

of lawful and reasonable discretion on the part of prison administrators.

When he is committed to prison, a prisoner loses his right to select his associates. His associates are selected by the prison administrators after considering all aspects of the situation. Where used to promote discipline and not discrimination, the race of the prisoner is as valid a consideration as any other.

ARGUMENT

I.

NO ORDER OR DECREE SHOULD BE SUSTAINED ON THE BASIS OF A CLASS ACTION WHEREBY THE WARDEN OF THE LARGEST CITY IN THE STATE OF ALABAMA IS NAMED AS A REPRESENTATIVE OF ALL OTHER WARDENS AND JAILERS OF CITY AND TOWN JAILS OF ALABAMA.

This case insofar as it purports to be a class action against Appellant Robert K. Austin, as warden of the city jail of Birmingham, Alabama, and all other wardens and jailers of city and town jails of Alabama, jointly and severally, who are similarly situated, is without authority. There is no allegation that other wardens and jailers are similarly situated as the warden of the city jail of Birmingham. *The most important issue in this case is the issue of prison discipline and security.* We respectfully submit that no judicial decision which places every city, town and village jailer in the State of Alabama under an injunction or order such as the decree appealed from should be rendered in a scatter gun action in which the particular factual conditions applicable to each jail and the community served by it are not placed in evidence before the court. It is apparent that the city jail of the City of Birmingham, a municipality in excess of 340,000 inhabitants located in a county of over 600,000 inhabitants has little in common with the many small town jails in this State. The Appellant Robert K. Austin is not and cannot under the law of Alabama be a representative of all wardens and jailers of city and town jails in Alabama. This Court judicially knows that the Appellant Austin has no

control, supervision or duties with respect to any jail in the State of Alabama other than the Birmingham City Jail. The Appellees by their naked allegations cannot make him such a representative. The questions of fact applicable to all the unnamed class are not the same as the questions of fact applicable to the Appellant Austin.

We respectfully submit that this case should not affect the duties and obligations of the jailers of the small towns and the smaller cities of this State unless they are made parties hereto and granted the privilege to submit evidence as to conditions at their jails, the supervising force thereat, and such other conditions relevant to such jails and the community served thereby as is relevant.

As will be pointed out hereinafter in this Brief, all constitutional rights which a person has outside of a jail do not necessarily follow him into a jail as a prisoner. In prison, a prisoner has only such rights as can be exercised without impairing the requirements of prison discipline and security. *Sostre vs. McGinnis*, 334 F. 2d 906, cert den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

For the protection of society, prison personnel and the prisoners themselves, the Courts have wisely subordinated *all* claimed constitutional rights of prisoners to the reasonable requirements of prison discipline and security. In a matter so important as prison discipline and security, we respectfully submit that no suit for injunction relating thereto should be considered unless the prison officials of each municipality involved are parties thereto and the proposed injunction is weighed against the facts relevant to each city or town jail and the community served thereby.

II.

STATE STATUTES REQUIRING THE SEPARATION OF PRISONERS BY RACE IN STATE, COUNTY, CITY AND TOWN JAILS IN THE STATE OF ALABAMA ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

Jails are primarily maintained for the purpose of punishing a convicted offender, of acting as a deterrant to the commission

of other crimes or offenses by such offender or others, and for safeguarding society by separation therefrom of persons of criminal inclinations who have been convicted of particular crimes or offenses.

It is apparent to casual observation that a jail population of two thousand individuals is not comparable to a group of two thousand persons selected at random from the general population.

The addiction to violence, the disregard of law, and a hostile attitude may be expected of inmates of the average jail or penitentiary to a much greater degree than would be expected of a similar number of persons from the general population taken at random.

Therefore, we respectfully contend that the same rules relating to race which this Court has decreed since 1954 in connection with public parks, schools and similar public facilities are not applicable to prisons, and should not be so extended. The state statutes held invalid in this case as violating the Fourteenth Amendment were, of course, enacted by the Legislature of Alabama. These statutes require the classification of prisoners in connection with certain prison activities according to race. This Court has held that a classification (in a case involving taxes), though discriminatory, is not arbitrary nor violative of the Fourteenth Amendment *if any state of facts reasonably can be conceived that will sustain it. Allied Stores of Ohio, Inc. vs. Bowers*, 358 U.S. 522, 3 L.Ed. 2d 480, 79 S. Ct. 437. Certainly, it can be assumed that the propensity for violence and disorder in a prison population was a matter within the knowledge of the Legislature when the statutes involved in this case were enacted. If the purposes of these statutes were, as we contend, to maintain the internal security of the prisons and jails of the State and to protect the prisoners, jailers and others from bodily harm, then they should not be summarily struck down.

In presenting the above argument we are not unmindful of the decisions of this Court which have not recognized the probability of disturbances and breaches of the peace as sufficient to sustain a classification based on race in a statute applicable to the general population and relating to schools, public

parks or similar public facilities. Such facilities are not comparable to prisons. In all such facilities the use of the facilities is voluntary and the primary purpose thereof is for the enjoyment or beneficial use derived by the users thereof. The primary purpose of prisons is not for the enjoyment or beneficial use thereof by the inmates. The inmates are not there voluntarily. The need for order and discipline in prison because of the nature of a prison and the concentration therein of persons both white and black with belligerent and hostile attitudes is far greater than in the general population. Facts existed which indicated to the Legislature that the statutes involved in this case would promote prison security. Certainly, no racial riots have occurred in Alabama prisons and jails while operating under these statutes. This Court has held that where a statute is assailed as unconstitutional the Court *must* assume the existence of any state of facts which would sustain the statute in whole or in part. *Alabama State Federation of Labor vs. McAdory*, 325 U.S. 450, 89 L.Ed. 1725, 65 S. Ct. 1384. We respectfully contend that such facts exist and the said statutes should be sustained. This Court has held that a State statute should not be struck down if it is within the State's constitutional power, even though it may approach the limit of that power. *Everson vs. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 91 L.Ed. 711, 67 S. Ct. 504, 168 ALR 1392, reh. den., 330 U.S. 855, 91 L.Ed. 1297, 67 S. Ct. 962.

III.

THE MAINTENANCE OF DISCIPLINE AND INTERNAL SECURITY IN A PRISON IS MOST IMPORTANT TO SOCIETY, PRISON PERSONNEL AND THE INMATES AND THE EXERCISE OF REASONABLE ADMINISTRATIVE DISCRETION THEREIN SHOULD NOT BE HAMPERED BY INFLEXIBLE JUDICIAL ORDERS, EVEN IF THE EXERCISE OF THAT DISCRETION RESULTS IN SOME SEGREGATION OF THE RACES.

If, for the purpose of argument only, we assume that the decree of the District Court insofar as it held invalid statutes involved in this case is due to be affirmed, it does not follow that the District Court is due to be affirmed in that aspect of the decree which requires complete integration of the prisons and jails of the State of Alabama. If the statutes are held invalid

and void, they will cease to be of any effect. The prison and jail administrators and wardens would then exercise their responsibility for the security and safety of the prisons in the area of race, as in other areas, based on their determination of the situation in their respective prison or jail.

Occupying the position of warden includes bearing the burden of maintaining prison security and discipline. In carrying out this responsibility, the warden must choose the course to follow which will result in the maximum good for all concerned. This necessarily requires that much be left to his discretion. It is the exercise of sound discretion and sound judgment by the warden, the man on the scene, which should prevail. A judicial opinion, however well reasoned, may turn out to be unrealistic. Inflexible pronouncements of the court may bind the hands of the prison authorities so as to endanger the lives of all concerned..

One of the decisions that should be left up to the discretion of the various wardens is whether prisoners should be separated on a basis of race when good judgment and common sense require it. The decision which is reached on that question may be different in a maximum security prison from that in a minimum security prison; it may be different in Macon County from Marshal County; in Hayneville from Huntsville. There are too many varying factors involved for the court to "freeze" a pattern. Each instance where segregation is deemed by any person to be in violation of constitutional rights can and should be immediately reviewed. The courts through their injunctive powers can force immediate correction; no lasting damage or harm can result from such a course. On the other hand, if you remove discretion by a rigid decree violence and even death may follow.

The point of the appellant's argument here is that the wardens must have the authority to do as they, in their experience and judgment, conscientiously believe is best under the circumstances. If there should be any abuse of this discretion (and even in the present situation, where the prisons and jails are being administered under the mandate of the State laws, there has been no evidence introduced that the operation of the prison system has been abusive or unequal as regards either race) then the District Court could move in to investigate the

particular situation just as it has been so quick to do in many fields.

Under such conditions, the prison and jail administrators and wardens would then exercise the responsibility for the security and safety of the prisons in the area of race as in other areas, based on their determination of the situation in their respective prison or jail. It would be their decision as to whether racial separation in a particular prison or jail activity at a particular time was necessary or whether integration was feasible and could be accomplished without danger to prison discipline or security. That does not mean that the prisons should or will have a strict policy of apartheid; such a policy has no place in a modern prison system and this fact should be so recognized. The record in this case shows clearly that the appellants would not take an arbitrary or capricious approach to the questions involved in this case.

Sheriff Melvin Bailey of Jefferson County, Alabama, a respondent in the case below testified in effect that the facilities of Jefferson County Jails are used interchangeably by both races but not on an intermixed basis (R. 189). Religious services in the Jefferson County Jail are, however, integrated (R. 187). In this county jail the trusties are integrated (R. 186). There are situations in the Jefferson County Jail where it is desirable to segregate some prisoners from others on the basis of race (R. 187).

In the Birmingham City Jail the separation of Negro and white prisoners to the extent that such separation exists is because, in the opinion of the Warden of the Jail (Appellant Austin), such separation is necessary to maintain the internal security of the prison and to protect the prisoners and others from bodily harm (R. 96). No segregation of prisoners according to race at the Birmingham City Jail exists except to the extent necessary to maintain the internal security of the Jail and protect the prisoners and others from bodily harm (R. 18, 19, 96, 97).

There is no evidence in this case and no theory of law which justifies the summary substitution of the judgment of a federal court for the judgment of trained and experienced prison administrators relating to prison discipline and security, as will

result if the judgment, appealed from in this case is affirmed without modification.

We are not unaware of the decision of the Fifth Circuit Court in the case of *Singleton vs. Board of Commissioners, et al.*, 356 F. 2d 771, and the fact that if said case is applicable it was binding on the District Court in this case. However, said case, even if applicable, is not binding on this Court and this Court has not heretofore subordinated prison security and discipline to claimed constitutional rights of prisoners. *Singleton*, supra, is not applicable to this case because: (1) It related only to reform schools of the State of Florida and the issue of prison discipline and security was not made an issue in that case; (2) The reasoning in *Brown vs. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S. Ct. 686, related to segregation of schools and the physiological effect of such segregation on Negro children. Such physiological effect and its result does not exist in connection with prisons and if it did it should be subordinated to the requirements of prison discipline and security; (3) *Johnson vs. Virginia*, 373 U.S. 61, 10 L.Ed. 2d 195, 62 S. Ct. 1053, cited by the Circuit Court as authority for *Singleton*, supra, does not support an argument for court required integration of prisoners irrespective of the requirements of prison security and discipline. *Johnson, supra*, involved segregation by race of the public seats in a court room. A court room which is open to the public is not comparable to a prison or jail.

The case of *Edwards vs. Sard*, 250 F. Supp. 977 is a District Court case which involved dormitory housing at Lorton Federal Reformatory in the District of Columbia. As shown by the report of the case, the prisoners at this reformatory were serving sentences resulting from felony convictions and their sentences were measured by years. The ratio of Negroes and whites at Lorton was about ten Negroes to one white. Of the twenty-two dormitories at Lorton, only six were integrated. In *Edwards*, Mr. Charles M. Rogers, Deputy Superintendent of Lorton, who was in charge of making dormitory assignments, testified that he considered the race of prisoners as one factor in deciding to which dormitory to assign them. The *Edwards* case also indicates that Mr. Thomas R. Sard, Director of Corrections, considered race as material in the assignment of dormitory space to prisoners. The District Court in that case, in its opinion stated

that, "Mr. Sard indicated a sincere awareness of the desirability of achieving the greatest possible intermingling of the races consistent with the *security of the institution*". (Emphasis added). To further show the relation of race and prison security Mr. Sard, in the *Edwards* case, testified as follows: "We would like very much to have every dormitory we have integrated if we had a sufficient proportion of white to Negro to do this *safely*." (Emphasis added). In *Edwards*, the Court granted judgment for the defendants after it found in effect that the procedures at Lorton (although only six of twenty-two dormitories were integrated and race was considered in the assignment of prisoners) were satisfactory as being "consistent with the security of the institution".

When a prisoner is placed in jail, he has only such rights, including constitutional rights, as will not impair prison discipline or internal security. *Sostre vs. McGinnis*, 334 F. 2d 906, cert. den, 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland*, 337 F. 2d 72.

The right to receive letters in prison may be limited, *United States vs. Illinois*, et al., 343 F. 2d 120, and yields to the requirement of maintaining internal discipline of prison. *United States vs. Fay*, 197 F. Supp. 855.

Religious freedom, a constitutional right, may be limited in prison. *Sostre vs, McGinnis*, 334 F. 2d 906, cert den. 379 U.S. 892, 13 L.Ed. 2d 96, 85 S. Ct. 168.

The attendance at a prison school may be denied. *United States vs. Pate*, 229 F. Supp. 818.

Jones vs. Willingham, Warden, United State Penitentiary, Leavenworth, Kansas, 248 F. Supp. 791, is a case which involved action by an inmate of maximum security federal prison who claimed that he had been subjected to punishment and deprivation of privileged accorded adherents of other religious faiths because of his Black Muslim religion. The District Court held that the warden was fully justified in imposing upon prisoners professing Black Muslim beliefs restrictions precluding

them from meeting together as such and precluding their ministers from entering the penitentiary, in view of the responsibility of the warden to public and non-Muslim inmates.

In *Jones vs. Willingham*, the Court, in its decision, sets out some important principles relating to rights of a prisoner as follows:

> "Imprisonment carries with it many restrictions. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' Price vs. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). *'A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline.'* Sostre vs. McGinnis, 334 F. 2d 906, 908 (2d Cir., 1964), cert. denied, 379 U.S. 892, 85, S.Ct. 168, 13 L.Ed. 2d 96 (1964). '(E)xcept in extreme cases the courts will not interfere with the conduct of a prison with the enforcement of its rules and regulations, or its discipline * * * .' Childs vs. Pegelow, 321 F. 2d 487, 491 (4th Cir., 1963), cert. denied, 376 U.S. 932, 84 S. Ct. 702, 11 L.Ed. 2d 652 (1964). One committed to prison, however, does not on entering the place of his confinement leave his constitutional rights at the gates. Pierce vs. LaVallee, 293 F. 2d 233 (2d Cir., 1961). The issue here may be stated as it was in the Pierce case:
>
> " * * * Either the plaintiffs were punished solely because of their religious beliefs or they were not. If they were, the defendant's conduct violates * * * the United States Constitution. If the plaintiffs were punished for legitimate reasons * * * (the) law is (not) violated.' l.c. 235-236." (Emphasis added)

In *Labat vs. McKeithen, et al.*, 361 F. 2d 757, the United States Court of Appeals for the Fifth Circuit held that a state statute to the effect that, until time of execution, convict shall be kept in solitary confinement and no one shall be allowed access to him without order of court, except certain persons, was reasonably construed by the State Attorney General to include the act of correponding with the prisoner.

In *Price vs. Johnston*, 334 U.S. 266, 285, 92 L.Ed. 1356, 68 S.Ct. 1049, 1060, the Supreme Court of the United States recognized the general rule of law that:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system."

In *Roberts vs. Pepersack, et al*, 256 F. Supp. 415, the District Court held that a prisoner, while in prison, was not entitled to freedom of speech and freedom to demonstrate. In rendering the above decision, the Court referred to *McClaskey vs. State of Maryland*, 337 F. 2d 72 (4th Cir., 1964), where the Court held that:

> "A propagandist has no judicially enforceable right to propagandise within the prison walls, whether his propaganda be directed to other inmates or to outsiders."

From the above decisions, it is clear that in dealing with alleged rights and claims of prisoners the courts have held that the dominant issue to be determined is not whether such alleged rights or claims are bottomed upon constitutional provisions but even if so bottomed, what effect, if any, will the recognizing or granting thereof have upon prison discipline and security? We do not believe that there exists any federal case where prison discipline and security was considered and subordinated to any claimed constitutional right. The very nature of a prison requires that there be no such subordination.

This being so, the exercise of a claimed right of a Negro prisoner not to be placed in a cell occupied only by other Negroes, or of a white prisoner not to be placed in a cell occupied only by other white persons, must be considered in the light of prison security and discipline.

This Court can judicially recognize that in the State of Alabama to place Negro and white drunks in the same "bull pen" in a city jail would not be as conducive to the maintenance of discipline and security as to place in separate "bull

pens" according to race. The same could be said of persons incarcerated for riotous or disorderly conduct. The same could be said of other persons who are by nature inclined to violence. It is common knowledge that prisons are not at all times under the supervision of guards and for that reason prison officials should assign and house them so as to reduce to a minimum all possible cause for disturbances. The plaintiff Thomas E. Houck, Jr., a white civil rights worker, alleged in the complaint (R. 3) that he was roughed up by white prisoners during his confinement. What would those same prisoners have done to Rap Brown?

Another situation readily comes to mind. The North and West have been rocked with repeated outbursts of Negro rioting, arson and looting. As yet, thankfully, these outbreaks have not evolved into biracial warfare but with the increasing tension in the cities and the irresponsibility of the riot leaders, biracial warfare is much less inconceivable than the Watts, Newark and Detroit riots were only two years ago.

For the sake of argument, suppose such warfare were to erupt in any city, Los Angeles, perhaps. Let us further suppose that the police moved in and arrested 100 whites and 100 Negroes who were battling in the streets. If the injunctive portions of the district court's order are allowed to stand, what would happen when these 200 rioters were incarcerated together in the completely integrated facility, under the requirement that there be no segregation?

This cannot be allowed to happen. Reasonable discretion must be left with the officials in charge of a prison or jail to decide what should be done under different circumstances. The maintenance of discipline and security in a state prison or a county, city, town or village jail is most important to society, prison personnel and the inmates; so important, that the exercise of reasonable discretion therein should not be hampered by inflexible judicial orders, even if the exercise of that discretion results in some segregation of the races. This would not result in overriding any of the prisoners' constitutional rights, but rather the prisoners' fundamental constitutional right of safety and freedom from harassment may require discretion-

ary separation of the races on some occasions and under some circumstances.

Attention is directed to the affidavit of A. Frank Lee, Commissioner of Corrections of Alabama, attached to the Application For Stay Pending Appeal, which affidavit, for convenience is set forth in full in Appendix C. This affidavit, made a part of the appeal as a basis for the Stay, is factually important in showing that circumstances may be present in many prisons and jails which would require more flexibility than is allowed by the rigid mandate of the lower court.

The importance of not disturbing the determination of prison officials as to prison discipline and security was forcefully recognized by the United States Court of Appeals for the Seventh Circuit in *Walker vs. Pate,* 356 F. 2d 502, where the court held that a prisoner's various complaints as to his not being permitted to keep some law books and to receive visits by his wife and daughter were matters within the scope of the prison's discipline and security. In this case, the opinion set out for the benefit of inmates of state prisons within the Seventh Circuit, the following:

> "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts . . . . A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights."

An individual warden or jailer owes a duty to a prisoner placed in his custody to keep the prisoner safely and free from harm according to *Cohen vs. United States,* 252 F. Supp. 679. Neither the State nor a municipality in Alabama is liable in damages to a prisoner injured in a jail because the operation of the jail is a governmental function, but it is under a legal duty to protect each prisoner from harm while in custody. If

the duty to keep a prisoner free from harm is in the State, the municipality, the warden and the jailer, should not they rather than the federal courts determine what is reasonably necessary to insure such safety? The importance of this is made clear when we consider that in the *Cohen* case an award of $110,000 to the prisoner was approved by the District Court because of the negligence of prison administrators in permitting prisoner Cohen to be assaulted by a fellow inmate and seriously injured while in prison. The duty is on the municipality and the wardens and jailers to safeguard a prisoner at the Birmingham City Jail, and on the State and County and their prison administrators to safeguard prisoners in a county jail or state prison. This being so, no decree should be sustained that can do nothing but decrease the safety of prisoners and personnel at the state, county, city and town prisons and jails in the State of Alabama.

We believe that this is the first case to come before this Court which involves the authority of a federal court to direct particulars of prison management in that sensitive area of prison discipline and security. The decision in this case will be very important to the public, state law enforcement officers, and municipal officers in that the main issue here is whether or not the Fourteenth Amendment contemplates the substitution of judicial opinion for the opinion of competent prison administrators as to procedures which have been determined by such administrators to be desirable or necessary for the maintenance of prison discipline and security.

We respectfully submit that if this Court should hold the statutes involved in this case invalid it does not necessarily follow that a federal court should affirmatively and inflexibly force the racial integration of every state prison, county jail, city jail and small town calaboose in the State of Alabama as was done by the District Court in this case without regard to prison security and discipline and other valid considerations. The only witness offered by the Appellees in the District Court on the issue of integration of prisons and jails in Alabama was without any experience as to Alabama prisons and without any knowledge as to county and city jails in the State, and his experience has been entirely in the Federal Prison System (R. 152).

This witness, placed on the stand as an expert by the Appellees, was their only witness and his apparent feeling that racial integration of a prison should not be subordinated to prison security and safety is shown by a discussion of the testimony of Mr. Thomas R. Sard, Commissioner of Correction of the District of Columbia, Superintendent Weakley, and Deputy Superintendent Charles M. Rogers of Lorton Penitentiary referred to In *Edwards vs. Sard*, supra. This discussion, as shown by the record in this case, occurred on cross-examination of Mr. Boone and was as follows:

"Q. Are you —— do you know Mr. Charles M. Rogers, Deputy Superintendent of Lorton Penitentiary?

A. No, I don't.

Q. Do you agree with the statement that he made that was reported in Edwards versus Sard, 250 Federal Supplement 977, that the race of prisoners is one factor in deciding which dormitory to assign them to; do you agree or disagree with that?

Mr. Morgan: Object for just one point; I would like for the witness to be able to see the document from which Mr. Breckenridge is reading; he might just give it to him and let him familiarize himself with it.

Mr. Breckenridge: It is a copy from the Federal Reports.

Mr. Morgan: I thought it might be better for the witness to read what —— the words you were referring to in there. You might point out ——

Q. Mr. Boone, I was referring to this statement by the Court that Mr. Charles M. Rogers, Deputy Superintendent of Lorton —— the Court says, 'However, when examined whether he considered the race of prisoners as one factor in deciding which dormitory to assign them to, Mr. Rogers answered that he did.' Now, all I want to know, do you agree or disagree with that statement?

A. Well, I disagree with Mr. Rogers.

Q. You disagree with that. Now, do you know Mr. —— Mr. Sard, Edward Sard —— Thomas R. Sard, Commissioner of Corrections for the District of Columbia ——

A. No.

Q. —— do you know him?

A. No.

Mr. Fletcher: I didn't hear his answer.

Mr. McBee: He said 'No'.

A. No, I don't.

Q. Let me read this statement in the notes of that case, which says that 'Mr. Sard testified as follows: "We would like to see a reduction in the number of all-Negro dormitories. We believe that there is an advantage to both races if there can be interracial mixing to the extent that this can be done and maintain the security and safety of the institution." Now, do you agree with Mr. Sard that the question of security and safety of the institution is part of the problem of mixing the races?

A. No, I don't.

Q. You do not; all right. Now, let me read you from the same report, 'The Testimoney of Superintendent Weakley and Director Sard, on the other hand, reflected serious doubts about controlling the situation should total integration be ordered at this time'. Now, I believe your testimony was that integration of the races was not a problem relating to prison security. Now, do you agree or disagree that there would be a problem?

A. Could I say that at this time is the statement there, the crucial statement; he said, 'At this time'. Now, if the atmosphere is poor, if management is not ready for it,

if the people and you —— and if the process of desegregation is handled poorly, why, yes, you would have some difficulty, possibly.

Q. All right. Now, this note says, 'Moreover, controlling disturbances is not the only legitimate security concern of prison officials. Equally important is their desire to prevent disturbances from erupting.' Now, do you agree with Mr. —— Superintendent Weakley and Director Sard that equally important with the integration of the races is the desire to prevent disturbances from erupting?

A. No, I don't; because I honestly believe that in an integrated situation, tension will go down if properly managed, and that incidences will be reduced. In fourteen years in Atlanta, we went through all kind of integration process, and I never saw any trouble at all.

Q. You do not agree with them in these respects?

A. No, I don't." (R. 155-157)

As set out heretofore in this brief, the Courts have held that many rights are lost by persons when they are committed to prison, and rights derived from the Fourteenth Amendment are no exception when necessary or desirable in the interest of prison security and discipline. Prior to the decision of the District Court in this case, we do not believe any Federal Court has subordinated prison security to claimed constitutional rights. We respectfully contend that the determination as to whether the separation of the races in a particular prison is necessary or desirable to protect the discipline and internal security of the prison should be a matter to be determined by the prison administrators of the particular prison. Their judgment, if fairly and honestly made in this respect, should not be overturned by a Federal Court. The Appellees in this case seem to equate the integration of prisons with the integration of schools without taking into consideration the difference in the nature of a prison and a school or the difference in the primary purpose of a prison and a school. The tremendous difference between these two institutions makes inappropriate the many opinions

dealing with racial integration of schools. The same thing can be said of these cases with regard to integration of parks, airports and other public facilities patronized by the general population.

Most people in this Nation who are members of the general population, are law abiding and non-violent, and even though many of the law abiding and non-violent individuals may personally disapprove of total integration in many aspects of American life, they can nevertheless be counted upon to recognize the need of this Nation for obedience to law and will subordinate their personal opinions and beliefs in the area of race to the demand of the law where the law prohibits segregation. A prison or jail population is composed of a far greater proportion of violent, hostile and non-law abiding individuals than will be found in the general population. Recognition must be made of this fact in determining whether or not a particular prison or jail facility or activity should be integrated. The evaluation of this question as to any particular jail should not be made in the distant marble halls of the judiciary, but should be made by the prison administrators of the prison or jail involved, who best know the conditions which exist there.

Prior to December 12, 1966, the State and local authorities were limited in the exercise of their discretion by the mandate of the various state statutes. Since that time, those authorities had been faced with an opposite mandate from the federal court. The district court should not have assumed, and this court should not assume, that if allowed the opportunity the prison and jail authorities of Alabama cannot be trusted to operate our prisons and jails in a non-discriminatory manner. The various prison and jail officials should be given the opportunity to exercise their judgment and discretion and to show that in the exercise of that judgment and discretion they will not attempt to frustrate the obvious desire of the federal judiciary that no persons, whether in or out of prison, be subjected to discrimination on the basis of race. If, after the passage of a reasonable transitional period, it appears that the prison and jail administrators are continuing a strict policy of segregation of the races not required by the necessities of prison discipline, security or other valid considerations, the courts can once again step in and at that time, when the state and local authorities have shown

themselves to be unwilling or incapable of eliminating all racial segregation in the prisons not required for prison discipline and security, that will be the time for the federal court to specifically outline what the various authorities must do and when.

The District Court has taken two giant steps when only one can possibly be justified at the present time and under the facts presented to the district court. Even if this Court finds that the District Court was justified in its first giant step wherein it struck down the state laws requiring segregation in the prison system, this Court should limit the effect of the district court's order to that step only so that the various state and local prison and jail authorities may be given the opportunity to administer the operation of their prisons and jails in a lawful manner as seems best in the exercise of their judgment and discretion unhampered by the various state segregation statutes or the arbitrary district court deadlines.

CONCLUSION

We respectfully ask this Court to hold that the separation of the races in a prison or jail by administrative officials in charge of such prison or jail when they are of the opinion that such separation will aid in maintaining discipline and prison security is not a violation of any constitutional right of a prisoner, either Negro or white. To hold otherwise will involve federal courts throughout this nation in minute supervision of prison management in this area, and would pre-empt the exercise of lawful and reasonable discretion on the part of prison administrators. A prisoner loses his right to select his associates when he is committed prison. His associates are selected by the prison administrators on many bases. The factor of race is no less valid a consideration than sex, age or criminal record, in many circumstances.

It is unnecessary for the court to affirm the lower court decree in all particulars to definitely prohibit racial discrimination in prisons. Each instance of alleged unconstitutional racial separation or discrimination can be readily reviewed and corrected as it arises.

For the reasons stated above, it is respectfully submitted that the Order and Decree of the District Court in this case should be reversed.

Respectfully submitted,

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Attorney for Robert K. Austin,
As Warden of the City Jail of
Birmingham, Alabama, Appellant.

CERTIFICATE OF SERVICE

I, Nicholas S. Hare, one of the attorneys for the said appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11 day of September, 1967, I served copies of the foregoing Brief for Appellants by mailing in duly addressed envelopes, with first class postage prepaid (airmail where necessary), to the following attorneys for appellees:

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CALIPH WASHINGTON,) HOSEA L. WILLIAMS, JU-) LIA ALLEN, individually and) as mother and next friend of) WILLIE ALLEN, a minor,) WILLIE ALLEN, AGNES) BEAVERS, individually and) as mother and next friend of) CECIL McCARGO, JR., a mi-) nor, CECIL McCARGO, JR.,) JOHNNIE COLEMAN, and) THOMAS E. HOUCK, JR., for) themselves, jointly and several-) ly, and for all others similarly) situated,)

Plaintiffs,)

vs.) CIVIL ACTION NO. 2350-N

FRANK LEE as Commission-) er of Corrections of Alabama;) JOHN F. BRITTON, CHAR-) LIE CASHION, HERSCHELL) LUTTRELL, DR. MAX Mc-) LAUGHLIN and WILLIAM) MITCH, as members of the) Board of Corrections of Ala-) bama; A. MELVIN BAILEY,) as Sheriff of Jefferson County,) Alabama and all other sheriffs) of Alabama, jointly and sever-) ally, who are similarly situated;) ROBERT K. AUSTIN as War-) den of the City Jail of Birming-)

ham, Alabama, and all other) wardens and jailers of city and) town jails of Alabama, jointly) and severally, who are simi-) larly situated,)
Defendants.)

Before RIVES, Circuit Judge, and LYNNE and JOHNSON, District Judges.

JOHNSON, District Judge:

ORDER

This is an action for declaratory and injunctive relief instituted by one white and five Negro citizens on their own behalf and on behalf of other persons similarly situated, pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure. The plaintiffs seek a declaration concerning the rights of Negro citizens, male and female, not to be segregated, classified, designated, or otherwise subjected to racial distinctions in confinement in the state penal system and in the county, city and town jails of the State of Alabama. Further, plaintiffs assert that various statutes enacted by the Legislature of the State of Alabama, requiring segregation by race in the state, county and city penal facilities, are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. Plaintiffs ask that said statutes be declared unconstitutional and that the defendants be enjoined from requiring segregation by race in any of the state, county and city penal institutions in the State of Alabama.

Of the Negro plaintiffs, Caliph Washington is confined in the Jefferson County Jail, Jefferson County, Alabama, awaiting retrial on a capital charge; Johnnie Coleman, Willie Allen and Cecil McCargo, Jr., are confined in state penal institutions, and prior to their present incarceration had been confined under racially segregated circumstances in either city, town or county jails in Alabama; and Hosea L. Williams and Thomas E. Houck, Jr., were incarcerated in the Birmingham City Jail at the time this case was instituted.

The defendant Frank Lee is Commissioner of the Board of Corrections of the State of Alabama and as such is invested with the authority and charged with the duty of serving as the chief administrative officer of the Alabama Board of Corrections. Title 45, § 10(5), Code of Alabama, Recompiled 1958. The defendant A. Melvin Bailey is the duly elected and qualified sheriff of Jefferson County, Alabama, and as such has the legal custody and charge of the Jefferson County Jail and all prisoners committed thereto. Title 45, § 115, Code of Alabama, Recompiled 1958. The defendant Robert K. Austin is warden of the City Jail of Birmingham, Alabama, and in this capacity has the custodial duty and authority over prisoners in that jail. The defendants Bailey and Austin are sued individually and as representatives of all county sheriffs of Alabama and of all wardens and jailers of the city and town jails of Alabama.[1]

I

As noted in the complaint filed with the Clerk of this Court on February 18, 1966, plaintiffs Williams and Houck allege that they were then incarcerated in the City Jail of Birmingham, Alabama. It now appears, however, that the charges against Houck have been nol prossed and that Williams has entered a plea of guilty to the charges against him and has paid the fine imposed upon said plea. For these reasons, the defendants Austin and Bailey contend that plaintiffs have no standing to challenge any of the statutes or practices requiring segregation or relating to the segregation by race of the penal facilities of the City of Birmingham or Jefferson County. In *Singleton v. Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966), this same issue was raised in that the plaintiff had completed the actual service of his sentence. In *Singleton*, the Court set forth the general principle applicable in such instances:

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[1] In the complaint as originally filed, plaintiffs also named as defendants the individual members of the Board of Corrections of Alabama and asked that said defendants be enjoined from excluding Negroes from employment, or otherwise discriminating against Negroes in their efforts to secure employment with the Alabama prison authorities. Upon a pretrial hearing of this cause, and by agreement of counsel, this phase of the lawsuit was stricken.

> The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use.

There is no question but that the evidence in this case reflects a "past use" of the penal facilities of the City of Birmingham and Jefferson County by some of these plaintiffs. As to that part of the general rule stated in *Singleton* concerning the "reasonable possibility of future use," this Court does not conceive that it is necessary that plaintiffs show an intention to violate the laws of the State of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell v. United States*, 313 U.S. 80. Under the circumstances reflected by the evidence in this case, all that it is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail and the Jefferson County Jail is that the operation of these institutions, as that operation presently exist, "permit[s] the recurrence of comparable violations." *Henderson* v. *United States*, 339 U.S. 816. In this regard, the Supreme Court of the United States in *Barrows* v. *Jackson*, 346 U.S. 249, observed that the rule against relying on the constitutional rights of another (who may be in this case presently imprisoned in either the penal facility of the City of Birmingham or of Jefferson County) is not part of the constitutional requirement of standing, but is a rule of self-restraint which the court has developed for its own governance, and, for that reason, is a mere rule of practice not to be applied where it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of competent jurisdiction[2]. See also *Ferguson* v. *Buchanan*, No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965, where the criminal prosecution against the plaintiff, who was seeking to enjoin

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[2] In this connection, defendant Austin testified that the average length of time prisoners are incarcerated in the Birmingham City Jail is from seven to fifteen days. Under such circumstances, it would be impossible for a prisoner to file and secure an adjudication on his case before he was released.

the sheriff of Dade County, Florida, from maintaining segregated facilities in the jails of Dade County, was nol prossed before the case was submitted to the district court. That court, nevertheless, found the Florida statutes that required segregation in county jails on the basis of race unconstitutional, and enjoined the defendants from operating or maintaining jails in a manner requiring segregation of the races. For these reasons, it is evident that the contention on the part of defendants Austin and Bailey that these plaintiffs do not have standing to challenge the statutes and practices requiring segregation of the races in the penal facilities of the City of Birmingham and Jefferson County is not well taken.

II

As to the contention of the defendants Austin and Bailey that they are not representative defendants of other wardens, jailers and sheriffs in the State of Alabama and, therefore, that these plaintiffs cannot maintain this action through them as representatives of "the class" within the meaning of Rule 23, Federal Rules of Civil Procedure, this Court concludes to the contrary. While it may be that the physical facilities of Jefferson County and the City of Birmingham are more elaborate and their operations more complex than many of the other jails in Alabama, this, without more, cannot serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. See *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962). It would be extremely difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent—a requirement which, as indicated, is satisfied in this case—then it becomes immaterial whether certain of these class defendants are not otherwise identically situated. 3 Moore, Federal Practice, ¶ 23.10 at 3454

(2d Ed. 1963). See *Harris* v. *Palm Springs Alpine Estates, Inc.*, supra (citing cases).[3]

III

The only defense offered to the contention that the statutes involved herein[4] violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissable inquiry by the courts. We disagree. Since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated. As stated by the Fifth Circuit in *Singleton* v. *Board of Commissioners*, supra:

> Twelve years ago, in Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, the Supreme Court effectively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the State. "[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities." Johnson v. Virginia, 1963, 373 U.S. 61, 62, 356 F. 2d at 772.

Although it is true that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges

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[3] On this point this Court has serious misgivings as to the right of either the defendant Austin or the defendant Bailey to raise this particular question in this case. It appears that such a defense would, if valid, inure only to the benefit of other members of "the class" that these defendants are alleged to represent. The contention on the part of these defendants that, if they are not proper representatives of the other members of the class, venue in this district is improper as to them is without legal basis. Title 28, § 1392 (a), United States Code.

[4] The Alabama statutes that require segregation of the races in the prisons and jails of Alabama are §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958.

and rights, a retraction justified by the considerations underlying our penal system,"[8] it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law. *Cooper* v. *Pate*, 378 U.S. 546 (1965); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D.C. Cir. 1961). In this regard, this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances[9] prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Plaintiffs' contention that the separation of prisoners solely on the basis of race constitutes a violation of the "Cruel and Unusual" Punishment Clause of the Eighth Amendment to the Constitution of the United States is plainly without merit. There is no question but that, through the action of the Fourteenth Amendment, the Eighth applies to the states, *Robinson* v. *California*, 370 U.S. 660 (1962). However, the Cruel and Unusual Punishment Clause of the Eighth Amendment was adopted to prevent inhuman, barbarous or torturous punishment, *Black* v. *United States*, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U.S. 938 (1960); *Hemans* v. *United States*, 163 F. 2d 228 (6th Cir.), cert. denied, 332 U.S. 801 (1947); and segregation of individuals, while incarcerated, solely by reason of their race does

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[8] **Price v. Johnston, 334 U.S. 266 (1948).**

[9] **For example, the "tank" used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober. According to the evidence in this case, the population of the "tank" on Saturday nights in the Birmingham jail reaches fifty or more.**

not, in the opinion of this Court, constitute cruel and unusual punishment.

IV

The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel, such as Frank Lee as Commissioner of the Board of Corrections for the State of Alabama and A. Melvin Bailey as sheriff of Jefferson County, Alabama, deserves the most careful consideration of this Court. In this connection, it is recognized that "[t]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings," *Edwards* v. *Sard*, 250 F. Supp. 977 (D.C. Dist. 1966), and in light of this recognition this Court will not at this time require an immediate and total desegregation of state, county and city penal facilities in the State of Alabama. However, the several honor farms, the educational programs, the youth centers and the hospitals in the state system must be completely desegregated immediately. All facilities in the minimum and medium security institutions, including Draper Correctional Center and Julia Tutwiler Prison for Women, must be completely desegregated within six months. As to the maximum security institutions, such as Kilby Prison and Atmore Prison, the evidence reflects that considerations of security and discipline require a more gradual desegregation. In this connection, the Court will expect complete and total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year. As to the county and city systems, complete desegregation should be achieved within six months in all areas, including quarters, except in very exceptional instances as, for example, in the use of the "tank" mentioned previously.

No plan of desegregation will be required of any of these defendants. However, since it is the function and duty of the Board of Corrections for the State of Alabama, and particularly the Commissioner thereof, pursuant to §§ 3, 7, 10(1), 10(5), 10(8) and 11, to inspect and generally supervise every county and municipal jail or prison in any incorporated town and city

in the State of Alabama having ten thousand or more population, this Court will require the Commissioner of the Board of Corrections to supervise not only the desegregation of state penal facilities as herein ordered, but also the desegregation of the jails in the counties throughout the State of Alabama and in all towns and cities throughout the state. The Commissioner of the Board of Corrections will be required to report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and the county and city jails, and other penal facilities throughout the State of Alabama.

In view of the declarations herein made concerning the unconstitutionality of the state statutes in question to the extent that those statutes require segregation of the races solely by reason of their color, and with the further declarations as to the unconstitutionality of the practice of segregating prisoners in any of the state, county or city penal facilities solely by reason of race, and the declarations concerning the duty of appropriate officials to take the necessary steps within the periods herein indicated, this Court does not consider it necessary to issue a formal injunction in this case at this particular time. However, there should be no misunderstanding on the part of any of the officials involved concerning the duty imposed upon them by the law generally and by this order specifically to cease the practice of arbitrarily segregating the races in the state, county and city penal facilites. The officials of the State of Alabama, whether they be concerned with the state penal facilities or the county and city penal facilities, have an affirmative duty and responsibility to effect desegregation of these facilities in accordance with this decree. Jurisdiction of the case will be specifically retained for all purposes.

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, be and are, in each instance, declared violative of the Fourteenth Amendment to the Constitution of the United States to the extent that said statutes require segregation of the races in the prisons and jails of Alabama.

It is further ORDERED that the defendant Frank Lee as Commissioner of the Board of Corrections for the State of

Alabama, his successors in office, agents, servants and employees, take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system; that said officials take the necessary and appropriate steps to effect complete desegregation of the minimum and medium security institutions, as operated by the state penal system, within six months from the date of this decree; that said officials take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year from the date of this decree.

It is further ORDERED that the defendant A. Melvin Bailey as sheriff of Jefferson County, Alabama, and each sheriff of each county in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the county jails and any other penal facilities and operations that may be maintained by any such county, within a period of six months from the date of this decree.

It is further ORDERED that the defendant Robert K. Austin as warden of the City Jail of Birmingham, Alabama, and each warden in each town and city in the State of Alabama, their successors in office, agents, servants and employees, take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that may be maintained by any such town or city, within a period of six months from the date of this decree.

It is further ORDERED that the Commissioner of the Board of Corrections for the State of Alabama, his successors in office and agents designated by said Commissioner, supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to this Court every three months beginning March 15, 1967, concerning the steps being taken and the progress being made in the state penal institutions and in the county and city jails and other penal facilities throughout the State of Alabama.

It is further ORDERED that each sheriff and each warden in the counties, cities and towns in the State of Alabama furnish the Commissioner of the Board of Corrections for the State of Alabama such reports and information that may be required by said Commissioner in the discharge of his duty to report to this Court.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the defendants, but the Court is of the opinion that the State of Alabama should pay the costs for the defendants.

Done, this the 12th day of December, 1966.

RICHARD T. RIVES
United States Circuit Judge

SEYBOURN H. LYNNE
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

APPENDIX "B"

Section 4, Title 45

Code of Alabama, Recompiled 1958

"4. *Authority as to tubercular patients, and management of hospitals.*

The state department may also make such changes in the existing arrangements with reference to the segregation and treatment of tubercular patients, and other patients needing long time hospital detention and care, who are serving sentences for conviction of crime, so as to permit such patients to be transferred to the custody and care of those officers and agents who have the charge and control of the detention hospital or hospitals of the state convict system; the agents in charge of such hospital or hospitals during the period of the treatment of such convict patients are constituted the legal custodians of such convicts. Any such hospital or hospitals, or other places suitable and used under the convict system for the segregation and treatment of tubercular or long time patients may be opened under the authority of the state department and may be used for the segregation treatment and care of other inmates afflicted with tuberculosis or other diseases or ailments requiring long time detention, treatment and care, and who may be received from any other institution covered by this article, or from any hospital or other duly accredited and responsible institution in the state with which the state department may co-operate in the matter of the treatment or care of such patients. There shall be proper separation of convicts from free persons, whites from blacks, males from females, in such hospital or place of detention. The department is given general authority over the reception, care, custody and segregation of such persons, and is also vested with the power and authority, by and with the approval of the governor, to establish and promulgate rules and regulations for the proper conduct of the business and operation of such hospitals and places of detention, except as may be otherwise provided by this article."

Section 52, Title 45

Code of Alabama, Recompiled 1958

"52. (3643) (6547) (4493) (4658) *Males and females not worked or confined together; nor whites and blacks.*

It shall be unlawful for white and colored convicts to be chained together or to be allowed to sleep together; and it shall be unlawful to chain together or to confine together in the same room or compartment, male and female convicts. Whenever in the judgment of the governor and the director, it is practicable to do so, arrangements shall be made for keeping white and colored convicts at separate prisons and they shall not be allowed to be kept at the same place."

Section 121, Title 45

Code of Alabama, Recompiled 1958

"121. (4806) (7196) (4951) (4540) (4491) (3789) (241)

What prisoners kept separate.

Men and women, except husband and wife, must not be kept in the same room; and white and colored prisoners, before conviction, must also be kept separate and apart, if there be a sufficient number of apartments for that purpose."

Section 122, Title 45

Code of Alabama, Recompiled 1958

"122. (4856) *Prisoners separated by race and sex.*

It shall be unlawful for any sheriff, or jailer, or other keeper of the jail or the town or city prison, to confine in the same room or apartment of any jail or prison white and Negro prisoners; and men and women, except husband and wife, must not be kept in the same room or apartment."

Section 123, Title 45

Code of Alabama, Recompiled 1958

"123. (3722) (6619) (4557) (3755) (4321) *Imprisoning together white and colored prisoners before conviction.*

Any jailer or sheriff, having the charge of white and colored prisoners before conviction, who imprisons them permanently together in the same apartment of any jail, or other place of safe keeping, if there is a sufficient number of apartments to keep them separate, must, on conviction, be fined not less than fifty nor more than one hundred dollars."

Section 172, Title 45

Code of Alabama, Recompiled 1958

"172. (4866) *Janitor service and bathing facilities.*

The court of county commissioners, board of revenue, or city council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails; shall provide bathing facilities separate for Negroes and whites, males and females, soap and towels, hot and cold water, clean and sufficient bedding, and with clean clothes when the prisoners are not able to provide them."

Section 183, Title 45

Code of Alabama, Recompiled 1958

"183. (4877) *Size, etc., of jail, etc.*

Each county jail, or town or city prison, must be of sufficient size and strength to contain and keep securely the prisoners confined therein; and must contain at least four separate apartments, one for white men, and one for white women, one for Negro men, and one for Negro women. It shall be fireproof, properly ventilated, sufficiently lighted, by day and night, adequately heated, containing adequate sanitary plumbing, and sewerage connections, including separate bath facilities for whites and Negroes."

APPENDIX "C"

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

FRANK LEE, as Commissioner of Corrections of Alabama, et al, Appellants	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION
vs.	
CALIPH WASHINGTON, et al Respondents	

AFFIDAVIT OF A. FRANK LEE, COMMISSIONER OF CORRECTIONS OF ALABAMA

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I am A. Frank Lee, and I am Commissioner of the Board of Corrections of the State of Alabama. I have been in law enforcement work all of my adult life. I served as Deputy Sheriff and Sheriff of Greene County, Alabama, then from 1954, I served as Deputy Commissioner of the Board of Corrections and since 1960 as Commissioner.

On November 29, 1966, I testified in the hearing of the above case in the District Court. In essence, my testimony was that, in my opinion, orderly desegregation could be accomplished in the Alabama prison system without unduly upsetting or impairing prison discipline or security provided the prison officials were given sufficient time and were allowed some administrative discretion. Based upon my lifetime of experience in law enforcement work, and constant observation of the present situation in the Alabama prisons and other state prisons, I see now that we must have more time than was allowed by the District Court.

We must have time and opportunity to train and orient our personnel and to prepare the prison inmates. After all, our prison personnel are poorly paid and largely uneducated (10th

grade education being all required). The prisons in some of the more fortunate states are staffed with psychiatrists, psychologists, case workers, and counselors all who help with prisoner orientation, etc. We have none.

Prisoners must be carefully prepared for any radical change in their routine or environment. It has been my experience that nothing can be changed suddenly in prisons.

The prisoners must be acquainted with the new program and, so far as is possible, an attempt must be made to secure their understanding and acceptance.

No particular problem is presented by the prospect of racial integration with many of our prisoners, but with other prisoners, difficult problems are arising, some of which have not yet come to the surface. It appears to me that it will be necessary to take certain steps towards integration, then wait, then take further steps and constantly observe the reaction. There are many violent and incorrigible convicts of both races in our prisons who are looking for excuses and ways to make trouble. It will be inviting trouble to radically and suddenly make a change in prison routine as, unquestionably, presently ordered integration will do. The dangers of quick changes in prison routine are not limited to mere racial changes. This is not a question of the convenience of, or preference of, the prison officials, but is a matter involving safety and public interest.

Our existing prisons were not built with integration in mind. The first of our new facilities are scheduled to be ready in two years.

A serious and dangerous situation is presented. Our overriding concern is for the prevention of riots and disorders, both for the physical safety of the prisoners and for the prevention of their escape during any such commotion. Although riots are the chief worry, I am also concerned about the posssibility of prison feuds which can be extremely dangerous even though they may involve a smaller number of individuals. For instance, we are not in position to handle sex deviates now; we will be in a better position with the new facilities. We do not know what

will develop, and we are fearful of what will develop, if these people are racially mixed; we simply have no empirical guides in this regard, and this is one of the areas where trial and observation will be wise.

I understand that our prisoners have heard of, and have had the suggestion of the recent riots in the California and Michigan prisons; I am fearful that immediate integration will disrupt the relative calm of the Alabama prison system. For these reasons, I believe that it is in the best interest of the prisoners themselves that the Court ordered integration be stayed until the Supreme Court has an opportunity to review the case. The Supreme Court may very well hold, in line with other court decisions, that discretionary segregation by race, just as segregation by sex or age, is a matter of prison discipline, rather than racial discrimination. Then, should the State prisons return to the time proven procedures, the disruptive effect of changing back and forth would be compounded.

After all, the existing system has been in effect for more than 100 years, and a relative short delay in changing the system could do no substantial harm to the public or to any individuals, but a precipitous change could be disasterous.

In my capacity as Commissioner of the Alabama State Board of Corrections, I respectfully request an extension of the stay granted by the District Court, or an additional stay, pending this appeal.

A. FRANK LEE /s/

A. Frank Lee

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Sworn to and subscribed before me this the 1st day of March, 1967.

CONNIE A. HARPER /s/

Notary Public

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,

Appellants,

—v.—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,

Appellants,

—v.—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

BRIEF FOR APPELLEES

Statement of the Case

The Alabama Prison System consists of two prisons for men (Atmore and Kilby Prisons), one honor camp (No. Four Honor Camp), a correctional center (Draper Correctional Center), a youth center (Frank Lee Youth Cen-

ter), a cattle ranch (State Cattle Ranch), a trusty barracks (Trusty Barracks), a prison for women (Julia Tutwiler Prison for Women), and approximately 25 highway road camps (R. 27, 35, 160). All of the above institutions are maintained for racially exclusive prisoner populations with the exception of Atmore and Kilby Prisons, Trusty Barracks, No. Four Honor Camp, Draper Correctional Center, and Julia Tutwiler Prison for Women where it was found to be "impracticable to assign only one race" (R. 28, 36). In those facilities where members of both races are assigned, with the exception of the tubercular ward at Kilby Prison Hospital, white and Negro convicts of the same sex are not allowed to sleep together, eat together, attend religious services together or use at the same time the general facilities of the institution (R. 28, 36, 161, 176-177). Negroes are, however, allowed to participate in athletic and other recreational activities with members of the white race (R. 28, 36). Racial segregation of prisoners in the Alabama Prison System pursuant to state statutes is enforced by the Board of Corrections (R. 28-31, 36-37). Appellant Lee stated that the desegregation of prisons and penal institutions under his supervision might take a month or ". . . it might take a year; . . . we would make every effort to make it—make it function, but I would hate to think that we—we would have to do it in less than a year's time, even though if we were to get such order why, we would start possibly tomorrow" (R. 166, 167). Appellant Lee testified that formerly he had been a sheriff of Greene County, Alabama, that his duties as sheriff were substantially similar to the duties of every other sheriff in the State of Alabama (R. 171), and that within certain limitations based upon prison population and finances available, the duties of wardens of city and town jails are

substantially similar throughout the State of Alabama (R. 171-172). Appellant Lee further testified that there is a vocational rehabilitation program at Draper Correctional Center and that in his opinion the rate of recidivism for groups finishing the rehabilitation programs would be considerably less than for those which do not (R. 172-173). Appellant Lee stated that he expected no trouble from the desegregation of the State Cattle Ranch and that he would expect trouble in the maximum security areas of the State Penal System (R. 174-175). At the Kilby Prison Hospital there are three wings, one for white, one for colored, and one for tubercular patients, Negroes and whites being kept on an integrated basis in the latter (R. 176-177). The state's total prison population is 1,589 white and 3,427 Negroes (R. 177, 199-200). Appellant Lee stated that his department could make reports to the court concerning the desegregation of county and city jails and that "this is some of the planning that we have been doing, in anticipation of something like this" (R. 183).

A. Melvin Bailey, Sheriff of Jefferson County, Alabama (a defendant below), stated that all of the Jefferson County Prisons are maintained on a racially segregated basis (R. 65-67, 185), and that Negroes and whites never use the same facilities at the same time (R. 186). Religious services, however, are integrated (R. 187).

Visiting hours are separated on the basis of race (R. 189). A. Melvin Bailey testified that in his experience there had never been an occasion when it was necessary to classify prisoners solely because of race in order to maintain and operate any prison subject to his control and authority in a proper fashion (R. 189).

Prisoners are segregated on the basis of race in the City Jail of Birmingham pursuant to state law (R. 96-97). Monthly reports are furnished the Chief of Police of the City of Birmingham concerning the race, sex and age of prisoners confined in the Birmingham City Jail (R. 97).

Appellant Robert K. Austin (defendant below), testified that the average stay of a prisoner in the Birmingham City Jail was 7 to 15 days but that " . . . some get in and stay only a couple of hours" (R. 192-193). Appellant Austin further testified that his whole experience showed that integration created no problems with respect to trusties, work gangs, farm crews and maintenance crews (R. 195), and that his chief concern about integregation was the use of the drunk tanks and that he didn't foresee much problem except as to that particular facility (R. 196).

Appellees introduced into the record testimony of John O. Boone, an employee of the Southern Regional Council, a human relations agency with headquarters in Atlanta, Georgia (R. 145). Mr. Boone holds an A.B. degree from Morehouse College and a Master of Social Work degree from Atlanta University (R. 146). Mr. Boone is a former employee of the Federal Prison System, having been employed for approximately 14 years at the Atlanta Federal Penitentiary (R. 146). For a period of time he was Chief of the Classification and Parole Unit at the United States Penitentiary, Terre Haute, Indiana (R. 146). His present position with the Southern Regional Council involves his administering a three year Ford Foundation grant designed to support improvement of procedures to cope with delinquency and crime and to improve procedures of penal administration in the Southern region (R. 145-146).

Mr. Boone testified that based upon his experience no substantial problems would be met in any penal institution in the State of Alabama as a result of racial desegregation if such desegregation were properly managed (R. 147). Mr. Boone also stated that the process of desegregation in the Atlanta Penitentiary was begun in 1951 and concluded in 1965 but that he was not trying to imply that the desegregation process took that long to be implemented (R. 149). Mr. Boone stated that whether or not desegregation would work in a given prison was related to the management, whether or not they were determined, whether or not the atmosphere was right, and whether or not the policy of the institution was equal treatment without regard to race (R. 150). According to the witness the type of prisoners usually found in federal penal institutions is no different from those usually found in state institutions (R. 153). Mr. Boone testified that in an integrated prison situation tension would go down if the integration process were properly handled, and that racial incidents would be reduced (R. 157).

Defendant A. Melvin Bailey, sued as Sheriff of Jefferson County, Alabama, and as representative of the State's other sheriffs, filed no appeal.

ARGUMENT

1. ALABAMA STATUTES WHICH REQUIRE THE SEGREGATION, CLASSIFICATION AND DESIGNATION ACCORDING TO RACE OF PRISONERS IN STATE PENAL INSTITUTIONS AND COUNTY AND CITY JAILS VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

As the court below said, the law is ". . . unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington* v. *Lee*, 263 F. Supp. 327, 331 (M. D. Ala. 1967), citing *Brown* v. *Board of Education*, 347 U. S. 483 (1954). The *Brown* rationale was similarly applied in *Singleton* v. *Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966), to rule unconstitutional the practice of racial segregation in penal and correctional facilities in the State of Florida. In *Singleton*, the court noted:

> Twelve years ago, in *Brown* v. *Board of Education of Topeka*, 1954, 347 U. S. 483, the Supreme Court effectively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the state. "[I]t is no longer open to question that a state may not constitutionally require segregation of public facilities. *Johnson* v. *Virginia*, 1963, 373 U. S. 61, 62." 356 F. 2d at 772.[1]

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[1] See also *Edwards* v. *Sard*, 250 F. Supp. 977, 982 (D. C. 1966) where the court denied relief but only because plaintiffs " . . . failed to show that a policy of racial segregation . . . motivated dormitory assignments."

Confinement in a prison ". . . brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system . . ." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). However, it is a principle well established that prisoners ". . . do not lose all of their civil rights, and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into the prison and protect them there from unconstitutional administrative action on the part of prison authorities carried out under color of state law, custom or usage." *Talley* v. *Stephens*, 247 F. Supp. 683, 686 (E. D. Ark. 1965). *Cochran* v. *Kansas*, 316 U. S. 255 (1942); *Cooper* v. *Pate*, 378 U. S. 546 (1964); *Sewell* v. *Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2nd Cir. 1961); *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D. C. Cir. 1961); *Ex Parte Cleio Hull*, 312 U. S. 546 (1941); *Johnson* v. *Dye, Warden*, 175 F. 2d 250 (3rd Cir. 1949); *White* v. *Ragen*, 324 U. S. 760 (1945); *Monroe* v. *Pape*, 365 U. S. 167 (1961). Appellants contend that the instant case involves routine prison discipline with which the courts should not interfere. *Walker* v. *Pate*, 356 F. 2d 502 (7th Cir. 1966). Appellees submit, however, that this case involves not prison discipline or the exercise of lawful discretion by prison officials. Rather the case involves segregation by race as a matter of state law. In matters of racial segregation prison officials have no "authority" whatsoever. Alabama's statutes themselves eliminate all discretion. The court below correctly found ". . . no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities." 263 F. Supp. at 331.

Appellants contend that prisons are not operated for the "benefit" of inmates (Appellants' Brief, p. 16) but are maintained solely to punish, to deter, and separate (Appellants' Brief, pp. 14-15). Without citing any authority for the proposition, appellants conclude that the above functions of penal institutions relieve them of the duty of complying with the Fourteenth Amendment of the Constitution of the United States.

The whole weight of modern penological theory and practice mitigates against the acceptance of any exclusively punitive philosophy. According to Myrl Alexander, Director of the United States Bureau of Prisons, "the argument for retribution has been weakened by increasing evidence that criminal behavior is neither the exclusive nor direct result of the exercise of 'free will' . . . The avowed purpose of deterrence at least recognizes protection of society as the aim of punishment. But, if punishment or the fear of it, deters as its proponents claim, it follows that the more severe the punishment the more effective the deterrence. It has been amply demonstrated that this is not so."[2] The Correctional Task Force of the President's Commission on Law Enforcement and the Administration of Justice observed that "The extent to which, and the situations in which, various sorts of punishment act as deterrents is wholly unestablished by objective research or study."[3]

Louie L. Wainwright, Director of the Federal Department of Corrections, has similarly questioned the validity

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[2] Myrl E. Alexander, "Corrections in Transition," Nebraska Law Review, 45:10, p. 14.

[3] Task Force Report: Corrections, the President's Commission on Law Enforcement and the Administration of Justice, U. S. G. P. O., Washington, D. C. (1967), p. 2.

of the deterrence theory. "Another prevalent belief was that having once been confined an inmate's fear of again being imprisoned would be enough to keep him from returning to a life of crime. Statistics have proven that this 'fear' does not keep many from returning to prison a second, third or fourth time." [4] Wainwright further observes that "it [has] been a common belief in this country that the greatest good to come from a period of imprisonment was the fact that while the offender was isolated from society he could not commit any additional crimes. This may be true, but the fallacy of this reasoning is that 93% of all persons confined to a penal institution do eventually return to society and, unfortunately, many of these do commit subsequent crimes . . ." [5]

Thus the trend of modern penology is to operate institutions in such a way that changes will be effected in the behavior of the inmate to the end that he will be prepared to assume a socially acceptable role upon release. As early as 1870 this view was explicitly taken by the American Prison Association, which in the declaration of principles adopted at the National Conference on Penitentiary and Reformatory Discipline at Cincinnati, stated "the treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great objective should be his moral regeneration. Hence the supreme aim of prison administration is the reformation of criminals, not the infliction of vindictive suffering." [6]

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[4] Louie L. Wainwright, "A New Concept in Florida's Prison," Florida B. J. 39:161, March, 1965.

[5] *Ibid.*

[6] Cited by Richard Cloward, "Social Control and the Prison," *Theoretical Studies and Social Organization of the Prison,* Social Science Research Council, New York, 1960, p. 29.

Mr. Alexander has stated the case for an interrelation between protection of society and the rehabilitation of the offender. "The ideal of rehabilitation has been advanced as the most effective way to protect society against later relapses into crime and is based on belief in the worth and dignity of every human being and a willingness to expend efforts to reclaim him. The objective is to change the offender's attitudes, help him cope with the realities of his existence, acquire an understanding of his problems and needs, redirect his goals, redevelop his sense of values and achieve a greater measure of self discipline . . ." [7]

The prison reform movement began in the United States in the mid-nineteenth century. The movement broke with the older theories of criminology which emphasized severe discipline and isolation calculated to make men penitent. ". . . [T]he new movement fostered efforts to achieve more positive changes in the offenders by education and by vocational training." [8] The new penologists felt that prisons and correctional institutions should be more than merely places where men were incarcerated and punished. Rather, they should be places where inmates are educated and if possible reformed so that upon their release they could take their places in society as useful citizens. See generally: Dressler, David; *Practice and Theory of Probation and Parole,* 1959, Columbia University Press, New York, and *Readings in Criminology and Penology,* Columbia University Press, New York and London, 1964.

Racial segregation in prisons flies in the face of the basic principles of modern penology. If inmates in Alabama are

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[7] Alexander, *loc. cit.*

[8] Glasser, Daniel: *The Effectiveness of a Prison System and Parole System,* the Bobbs-Merrill Co., Inc., 1964, p. 260.

being "educated" it is an education in reverse. For instead of learning to respect the law and the rule of law that governs the world beyond bars, racially segregated prisoners, Negroes and whites, relearn contempt for the law. If the Alabama prison system is to fulfill its obligation to the citizens of that state and this nation to whom it daily sends released inmates, it must make an effort to prepare them for a life in a world in which they respect the law. And that law is color-blind.

Appellants resist desegregation, arguing the fear that desegregation will cause race riots or other forms of racial conflict. This Court has rejected the kind of logic which would permit appellants to maintain racially segregated state facilities which are in fact the historic cause of racial tension and disturbance. Appellants seem to desire to reap the benefits of the racial tension and strife which Alabama causes and perpetuates by its present practices. The old arguments of racial violence, or some subtle variant of them, have been made by segregationists since race became a public issue in this country. Before the public schools were integrated, they argued that neither race really wanted integration, and that in any case, there was no issue of public morality, only public safety. Many schools have since desegregated, and despite the determination of some state officials to make the process as painful as possible, there has been little actual violence—and certainly not on the scale predicted by segregation's prophets. The real problem had been the fear and distrust that the old custom of segregation had created and perpetuated. Violence is not the child of integration: it is the child of distrust and fear. For segregation undermines the confidence

of both races. The institution itself serves to prove itself. Thus, the viciously circular prophecy fulfills itself.[9]

Indeed, "the self-aggravating and self-defeating cycle of segregation . . . does not accomplish the expedient, short range goals of decreasing racial friction which it is supposed to achieve. Instead it frequently tends to increase such friction. And it is self-aggravating because officials frequently respond to the troubles intensified by segregation by increasing the restrictions of segregation."[10] Just such a technique is being utilized by the appellants. It is nothing more than a variant of the segregationists' old dogma.

It is interesting to note that when the Army began to desegregate its ranks in 1950, there were, according to Lee Nichols, a career newsman and journalist, " . . . general predictions of ruined efficiency, wrecked morale, even bloody revolt . . . (*Notes Made on Breakthrough on the Color Front,* Random House, New York, 1954, p. 7). There were objections from the enlisted men, who predicted all kinds of trouble and some of the big guys [i.e. Department of the Army officials] jumped all over it." (*Ibid.,* pp. 58-59.) And indeed, there *had* been trouble—serious racial disturbances, and even full-scale race riots. What then was the experience of the Army once the desegregation process had actually begun? According to Nichols:

> Detailed official analysis by statements of hundreds of field commanders, showed that racial conflict—once

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[9] Merton, Robert K., *Social Theory and Social Structure,* The Free Press, Glencoe, Illinois, 1949, p. 185.

[10] Mandelbaum, David G.: *Soldier Groups and Negro Soldiers,* 1952, University of California Press, Berkeley and Los Angeles, pp. 89-90.

> a critical military problem that led to repeated bloody riots, had all but vanished. With Negroes and whites no longer grouped separately, there was apparently little motive for racial "gang" conflict.[11] (*Ibid.*, p. 7.)

A typical example is that of Fort Jackson. Fort Jackson is located in the heart of the Piney Woods section of South Carolina, deep in the deep South. In 1950 not even the trains and Greyhound buses that pulled into nearby Columbia from New York or California were integrated. Somewhere along the route, Negroes were just sort of sifted to the back. To use a popular phrase of the time, this was the land of "sow belly and segregation." The name fit and the folks, white folks, liked it that way.

In the spring of 1950, Fort Jackson was integrated. There were no interracial incidents. The Fort had been recently reactivated as a major infantry training base. It was under the command of Brigadier General Frank McConnell. The first draftees arrived in August of that year and according to McConnell, he "tried to sort them by color, but they began pouring in more rapidly; we got up to 1,000 recruits a day." (*Ibid.*, p. 109.) As the re-

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[11] Other branches of the armed forces reported similar experiences. According to official Navy records, reports show that Negro personnel were being integrated successfully in previously all-white ships' companies. "The skippers were polled and all but one reported favorably according to an official observer." *Ibid.*, p. 60. As far as the Air Force was concerned, "the experiment [of integration] was succeeding beyond the most optimistic hopes. A typical center in San Antonio, Texas, had been training airmen without racial distinction for more than two months with 'no racial disturbances in any phase . . . on or off duty.'" *Ibid.*, p. 101. In fact, in both the Army and Navy "racial experts in the Pentagon noted with satisfaction the result they had come to expect in steps to end segregation—no untoward incidents or trouble of any kind." *Ibid.*, p. 216.

cruits arrived without any pattern—a busload of Negroes and then a busload of whites, McConnell found it impossible to sort them out on the basis of race. He had a very limited staff, and in spite of the fears expressed by some of his subordinates that he was going "off the deep end," he resolved to assign recruits to platoons without regard to race.

The new plan worked. There were no racial incidents during McConnell's entire tour of duty at Fort Jackson. According to McConnell, "the attitude of the Southern soldier was that this was the Army way; they accepted it the same way they accepted getting booted out of bed at 5:30 in the morning." (*Ibid.*, p. 111.)

It is another of life's ironies that the armed forces historically justifying its policy of segregation on the grounds of maintaining discipline, efficiency and morale now justify the policy of complete integration on the grounds of maintaining efficiency, discipline and morale.

In *Edwards* v. *Sard, supra,* the court said at page 977 that " . . . the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." The combat armed forces is an exception to this rule. Few would deny that physical danger and psychological pressures are at least as great in war as in correctional institutions. And it was just such a fact that the advocates of segregation in the armed forces pointed to as justification for maintaining racial segregation. Yet the armed forces did integrate, and while integration did not reduce the physical risks of war, it did reduce the psychological pressures that the armed forces personnel were under. Specifically it

made better soldiers of Negroes and whites alike, for it helped build mutual confidence and respect between fighting men of both races where before there had been only suspicion and distrust. The real source of racial tension and trouble in the previously segregated armed forces was the single fact of segregation, racial segregation itself.[12]

If ever there is to be improvement or a breaking of the self-aggravating and self-defeating cycle of segregation, state laws requiring racial segregation must be struck down. Such a course alone will insure the orderly administration of Alabama prisons and city and county jails. *Edwards* v. *Sard, supra,* 979 (" . . . Full racial integration is invariably a desirable goal . . . ").

Furthermore it is well settled that the threat of racial violence cannot justify the denial of constitutional rights. *Cooper* v. *Aaron,* 358 U. S. 1 (1958). This proposition is all the more applicable where, as here, prison officials themselves are the key to the orderly desegregation process. Just as constitutional rights " . . . are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature," *Cooper* v. *Aaron, supra,* p. 16, so the constitutional rights of appellees should not be sacrificed because Alabama officials do not care to insure that the process of prison desegregation will be orderly. As the court noted in *Buchanan* v. *Worley,* 245 U. S. 60, 81 (1917), quoted with approval in *Cooper* v. *Aaron, supra,* p. 16: "It is urged that this proposed segregation will promote the public peace by preventing race conflict. Desirable as this is, and important as is the public peace, this aim cannot be accomplished by

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[12] Mandelbaum, David G., *op. cit.*, pp. 89, 90.

laws or ordinances which deny rights created or protected by the Federal Constitution." [18]

Schools differ from prisons. However the *Cooper* v. *Aaron* line of cases is apposite. Prisons do have a correctional function. One of their most important functions is the education or, perhaps more aptly stated, the re-education of inmates. For this reason Alabama's penal institutions do have educational programs. The constitutional right to be free from a governmentally imposed policy of racial discrimination is clear.

2. APPELLEES HAVE STANDING TO CHALLENGE STATUTES AND PRACTICES REQUIRING SEGREGATION, CLASSIFICATION AND DESIGNATION BY RACE OF PRISONERS IN THE PENAL FACILITIES IN THE CITY OF BIRMINGHAM.

At the time of the filing of the complaint on February 18, 1966, appellees Williams and Houck were incarcerated in the City Jail of Birmingham, Alabama. Subsequently, the charges against Houck were *nolle prossed* and appellee Williams entered a plea of guilty to charges against him and paid the fine imposed upon said plea (R. 201-209). Appellants now assert that due to the fact that appellees Williams and Houck are no longer incarcerated they have no standing to challenge the statutes or practices relating

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[18] See also *Hunt* v. *Arnold*, 172 F. Supp. 847 (N. D. Ga. 1959); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 930 (N. D. La. 1960) (where the district court noted that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."); *Griffin* v. *Prince Edward School Board*, 377 U. S. 218, 231 (1964) ("Grounds of race and opposition to desegregation do not qualify as constitutional"), and *James* v. *Duckworth*, 170 F. Supp. 342, 350-351 (E. D. Va. 1959) ("The preservation of the public peace cannot operate in such a manner as to cause constitutional rights to be sacrificed or yielded.").

to segregation by race of the penal facilities of the City of Birmingham. The general principle of standing in such situations was enunciated in *Singleton* v. *Board of Commissioners, supra,* 773: "The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." It is not contested in the instant case that appellees enjoyed a "past use" of penal facilities of the City of Birmingham. As to the problem of future use the lower court correctly stated the law to be that it was not " . . . necessary that plaintiffs show an intention to violate the laws of the state of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell* v. *United States,* 313 U. S. 80. Under the circumstances reflected by the evidence in this case, all that is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail . . . is that the operation of th[is] institution . . . , as that operation presently exists, 'permit[s] the recurrence of comparable violations.' *Henderson* v. *U. S.,* 339 U. S. 816." 263 F. Supp. 329-330.[14]

The court below further noted that the rule against relying on the constitutional rights of others—those presently imprisoned in the City Jail of Birmingham—is not part of the constitutional requirement of standing but is rather a rule of judicial restraint which should not be applied where

[14] Also see: *Evers* v. *Dwyer,* 358 U. S. 202, 204 (1958); *Public Affairs Associates* v. *Rickover,* 369 U. S. 111, 116 (1962); *Anderson* v. *City of Albany,* 321 F. 2d 649 (5th Cir. 1963), and *Bailey* v. *Patterson,* 369 U. S. 31 (1962).

it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of proper jurisdiction. For in the instant case, as appellant Austin testified, prisoners are incarcerated in the Birmingham City Jail on an average of from seven to fifteen days and under such circumstances it would be difficult if not impossible for a prisoner to secure a hearing on his case prior to his release. *Ferguson* v. *Buchanan*, No. 64-107-CIV—CF, So. Dist. Fla., March 12, 1965. Aswell, the mere *nolle prossing* or other disposition of charges against appellees pending in the City of Birmingham at the time the suit hereof was filed cannot lawfully defeat the jurisdiction of the court once it attaches. In *Buckner* v. *County School Board of Greene County, Virginia*, 332 F. 2d 452 (4th Cir. 1964), a class action, the court held that even though all of the named plaintiffs had been subsequently placed in schools chosen by their parents or legal guardians and thus were entitled to no relief, the lower court still must consider their request for injunctive relief. The court reasoned that the case was not moot, nor jurisdiction over the defendants lost, for "the right of the plaintiffs to obtain injunctive relief for the class they represent as well as individual relief for themselves is clear beyond doubt." *Buckner* v. *County School Board of Greene County, Virginia, supra*, p. 454. The court went on to approve its language in *Bradley* v. *School Board of the City of Richmond, Virginia*, 317 F. 2d 429 (4th Cir. 1963): "[N]ot only are the individual infant plaintiffs entitled to relief which has been ordered but the plaintiffs are entitled, on behalf of others of the class they represent and who are similarly situated, to an injunction against the continuation of the discriminatory system and practices which have been found to exist," 332 F. 2d at 455.

Thus the court, having acquired jurisdiction over the parties and issues retains such jurisdiction so long as the complained of practices and statutes continue to exist. The fact that the named plaintiffs have been granted relief seems immaterial.

3. THE DISTRICT COURT CAN REQUIRE APPELLANT COMMISSIONER OF CORRECTIONS OF ALABAMA TO SUPERVISE THE DESEGREGATION OF ALL STATE PENAL FACILITIES WHERE THE BOARD OF CORRECTIONS FOR THE STATE OF ALABAMA, AND PARTICULARLY THE COMMISSIONER THEREOF, HAS THE DUTY TO INSPECT AND GENERALLY SUPERVISE EVERY COUNTY AND MUNICIPAL JAIL OR PRISON IN ANY INCORPORATED TOWN AND CITY IN THE STATE OF ALABAMA HAVING 10,000 OR MORE POPULATION, AND THE COURT MAY REQUIRE APPELLANT LEE TO MAKE REPORTS EVERY THREE MONTHS AS TO THE STEPS TAKEN AND PROGRESS MADE IN ELIMINATING RACIAL SEGREGATION IN THE STATE PENAL INSTITUTIONS AND IN THE COUNTY AND CITY JAILS IN THE STATE OF ALABAMA.

The District Court's decree requiring Appellant Lee to supervise the desegregation of all penal institutions in the State of Alabama and to make periodic reports to the court was a proper exercise of judicial discretion. The courts often require parties similarly situated to submit desegregation plans. See *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963). None was required here. Furthermore, the courts have recently approved the application of the Department of Health, Education, and Welfare Guidelines to school desegregation plans, a more extreme application of judicial supervision than is present in the instant case. *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966); *Kemp* v. *Beasley*, 352 F. 2d 14, 18-19

(8th Cir. 1965), and *Smith* v. *Board of Education of Morrilton Sch. Dist. No. 32,* 365 F. 2d 770 (8th Cir. 1966). It is clear that the courts may require appellants to take affirmative steps to insure the desegregation of public facilities in public institutions. *Bush* v. *Orleans Parish School Board,* 308 F. 2d 491 (5th Cir. 1962), on rehearing 308 F. 2d 503 (5th Cir. 1962); *Augustus* v. *Board of Public Instruction,* 306 F. 2d 862, 869 (5th Cir. 1962) (where the court required defendant Board to submit an amended and more adequate desegregation plan including additional specific measures which were then listed by the court), and *Ross* v. *Dyer,* 312 F. 2d 191 (5th Cir. 1962) (where the court entered its own desegregation order).

The court will, when necessary, enter a decree specifying the manner of implementation of its decision. See *Reynolds* v. *Sims,* 377 U. S. 533, 586-587 (1964) where the court noted that the ordering into effect by the District Court of a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was in the view of the Supreme Court " . . . an appropriate and well-considered exercise of judicial power."

Pursuant to §§3, 7, 10 (1), 10 (5), 10 (8) and 11 of Title 45, Code of Alabama, Recompiled 1958, the Board of Corrections for the State of Alabama and particularly the Commissioner thereof has the duty and function of inspecting and supervising every county and municipal jail or prison in any incorporated town and city in the State of Alabama having a population of more than 10,000. Appellant Lee further testified that such authority extended to all county jails and that only city jails in towns of less

than 10,000 were omitted from his general supervisory authority. Appellants contend that with respect to city jails in towns of less than 10,000 population appellant Lee has no supervisory power. However, both logic and the orderly administration of justice require that appellant Lee be required to discharge the supervisory and reporting functions vested in him by the court. Appellant Lee is the highest ranking prison authority in the State of Alabama. He must supervise and report on desegregation progress in almost all (and certainly the major) state, city, county and town penal facilities. He can do so regarding smaller facilities expeditiously and economically. Like means employed for reporting to him and to the court may be employed by using the same forms and techniques otherwise employed by him for those facilities under his direct control. And, in the event that Commissioner Lee could not exact compliance with the court's order in one of the few jails located in towns of less than 10,000 people, he need merely report that fact to the court. Since the custodians of those facilities are members of appellant's class, the court could directly deal with recalcitrant officials.

4. APPELLANT AUSTIN MAY STAND AS A REPRESENTATIVE DEFENDANT OF OTHER WARDENS AND CITY JAILERS IN THE STATE OF ALABAMA WITHIN THE MEANING OF RULE 23, FEDERAL RULES OF CIVIL PROCEDURE, SO THAT APPELLEES CAN MAINTAIN THIS ACTION THROUGH HIM AS REPRESENTATIVE OF THE CLASS OF WARDENS AND JAILERS OF CITY AND TOWN JAILS IN ALABAMA.

The court below expressed serious misgivings as to the standing of appellant Austin to raise the question of his ability to represent the class of wardens and jailers of city and town jails in the State of Alabama. The court reasoned

that if such a defense were available it would be available only to the other members in the class asserting inadequate representation and that as to the named appellants, jurisdiction in any event would be proper. However, the court ruled properly that such a defense would not be available to *any* members of the class, thus avoiding the question of whether or not such a defense could properly be raised, if available, by any of the named appellants. The rule of class representation requires only that there be questions of law and fact common to the named defendants and members of the class which they represent. Such a requirement was satisfied in the instant case. It is immaterial whether or not the members of the class are in every respect identically situated. 3 Moore, *Federal Practice,* paragraph 23.10 at 3454 (2d Ed., 1963). All the wardens and jailers in the State of Alabama are affected equally and in a similar manner by the statutory provisions complained of. Each such warden and jailer has identical interests with respect to the statutes requiring racial segregation in Alabama prisons and jails. The fact that the physical facilities of the Birmingham City Jail may be more elaborate and its operation somewhat different from those of other jails in Alabama cannot, standing alone, serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F. 2d 909, n. 7 at p. 914 (citing cases) (9th Cir. 1964). See also *Potts* v. *Flax, supra,* and *Sims* v. *Frink,* 208 F. Supp. 431 (M. D. Ala. 1962). It would in fact be literally impossible to find any member of a given class who could stand as a representative were not some significant differences in the actual facilities and operations involved allowable. The law

does not require such impossible preconditions for the maintenance of a class action.[15]

5. THE ORDER APPEALED FROM DOES NOT INTERFERE WITH THE EXERCISE OF LAWFUL DISCRETION ON THE PART OF STATE PRISON OFFICIALS.

The lower court did not require appellants to submit a plan of desegregation nor did it require that all penal facilities in the State of Alabama be desegregated immediately. Indeed, under state law no discretion existed in state officials regarding desegregation. Their discretion related to where, not whom, they would segregate. And the District Court allowed them literally every concession they requested as necessary to effectuate the desegregation of facilities within their respective institutions. Appellant Lee, for example, stated that some of his facilities could be desegregated immediately while others would take approximately one year (R. 166-167). The court's decree reflects appellants' judgment in this regard. In effect, appellant Lee wrote his own desegregation order. As to defendant Bailey, no appeal was taken and thus no disagreement with the court's plan of desegregation as to facilities within his jurisdiction can be raised. As to appellant Austin, it was stated that his concern about desegregation involved the use of the drunk tank and that he did not foresee "much

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[15] See *Sims* v. *Frink, supra, affd. sub nom. Reynolds* v. *Sims,* 377 U. S. 533 (1964) where three Judges of Probate of the State of Alabama were allowed to represent the class of all Judges of Probate in Alabama, notwithstanding that there were population disparities as regards their jurisdiction and administrative dissimilarities equally as great as those asserted here by appellants. See also: *Toombs* v. *Fortson,* 205 F. Supp. 248 (N. D. Ga. 1962) where six ordinaries (county officers whose duty it is to supervise primary and general elections) of selected counties in Georgia represented for purposes of a reapportionment suit all ordinaries in that state; *Baker* v. *Carr,* 369 U. S. 186 (1962), and *Dorsey* v. *Fortson,* 228 F. Supp. 259 (N. D. Ga. 1964).

problem except as to that" (R. 196). Accordingly, the court allowed six months for desegregation of institutions subject to the control of appellant Austin and specifically excepted from its desegregation decree "in very exceptional instances" the drunk tank or bull pens about which appellant expressed some concern. As was the case with appellant Lee, appellant Austin virtually wrote his own desegregation decree. The court allowed every concession requested by appellants. The decree of the court is thus an effectuation of appellants' own judgment. Plainly, the argument that the courts have usurped the discretion of prison officials is without merit.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLANTS REPLY BRIEF AND EXHIBITS (Newspaper Articles)

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Birmingham, Alabama, Appellant

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REPLY BRIEF

The traditional reluctance of the Courts to interfere with prison administration is solidly based on sound and valid reasons.

Prisoners, prison employees and the public are entitled to prison operation that will best insure prison discipline and security. And, that can be provided within the frame work of the law, including the Fourteenth Amendment. No single claimed right should be permitted to take precedence over the principal objective of keeping the prisoners safe from harm.

It has always been recognized that the prison authorities are under a positive duty to use reasonable diligence to prevent prisoners from inflicting injuries on each other.

As has been pointed out in previous briefs, numerous rights are indeed lost to prisoners by the very nature of incarceration; but, of course, numerous rights still remain—certainly the right to be humanly treated, the right to safety, and numerous other rights including those related to the Fourteenth Amendment, which rights in short involve protection from invidious racial discrimination.

All of these separate rights must be kept in balance, and it can be expected that at some times one right must temporarily yield to others, if the circumstances require it.

We have in this case an illustration of a legitimate area for the exercise of administrative discretion. It would be wrong, and even dangerous, for this court to upset the time honored, judicially recognized, principle permitting wide administrative discretion in an effort to stop one alleged invidious practice, particularly when you can insure the end of that alleged practice by a simple and clear declaration of the law. Your declaration of the law will be followed by reviews of those instances allegedly requiring correction as they occur in the future. You can in that way achieve justice and best insure safety and order.

For the Court to arbitrarily end racial segregation even though special circumstances in the future might show separation prudent, would be both unwise and injudicious. It has been argued that the State Legislature by statutes arbitrarily segregated the prisoners; now it is being urged that this Court just as capriciously make racial separation impossible by an inflexible fiat.

This Court can order the abolition of all arbitrary, unreasonable, capricious racial separation without taking the final and irretrievable step which was decreed by the lower Court.

Even the schools, which cannot be compared with prisons, were integrated with "deliberate speed". The orderly development, or the prudent evolution, of the law calls for a case by case review of the many varying factual situations as they arise. The order of the lower Court goes both too far and too fast.

The Alabama prison system is antiquated and over-crowded, frequently twelve people are confined to a cell, and as many as

150 people in one barracks. The new prison facilities are contracted to be completed in July, 1969; and it is reasonable to assume that some time will be required even thereafter. The Court must consider that the jail and prison systems of some other states may be even worse.

The theory of Brown v. Board of Education can not be applied to prisons; i.e. separate educational facilities are inherently unequal. In fact it can not be flatly stated that separate cells are inherently unequal. And, racial separation is not always discrimination.

The lower Court decree must be modified so that the final order will not preempt legitimate administrative discretion: prison officials still need reasonable discretion, not because the prisoners are white or black, but because they are dangerous.

You are not talking about school children; many of these men are vicious, violent, rebellious and deadly. In that regard, the lower Court attempted to distinguish between maximum security prisons, minimum security prisons and jails.

In the first place the lower Court's finding of fact (Order of Lower Court, paragraph IV) that Draper Correctional Center and Julia Tutwiler Prison for Women house only minimum or medium security prisoners is incorrect, and dangerously incorrect, for both institutions have many dangerous prisoners. Even jails are constantly holding some of the most dangerous prisoners — not just those prisoners kept for misdemeanors — for all prisoners are first jailed, whether they be the mass murderers, the criminally insane, or the like. They are later (after a trial or hearing) transferred to prisons or to insane institutions. This merely illustrates the lack of careful consideration given by the lower courts in its head-long effort to effect an immediate social change.

In Loving v. Virginia 388 U. S. 1, 18 L. ed 2d 1010, 87 S. Ct. 1817, 35 Law Week 3679, decided June 12, 1967, the Court held that the statutes there considered (miscegenation) "rest solely upon distinctions drawn according to race", and in the words of the Chief Justice " . . . at the very least, the Equal Protection Clause demands that racial classifications, especial-

ly suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' . . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which was the object of the Fourteenth Amendment to eliminate'. If the Alabama prison segregation statutes are voided by court declaration the remaining administrative discretion to reasonably segregate prisoners if and when necessary is certainly not "invidious" discrimination, racial or other. Moreover, when the separation, even by race, is necessary to a permissible state objective, viz, the accomplishment of prison order, discipline and security, it must be permitted.

The Court can take judicial or common knowledge of newspaper reports of prison riots and violence, some racially inspired, some not. Merely to refresh the Court's recollection of a few of such news reports, the Exhibit is attached.

Respectfully submitted,

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Birmingham, Alabama, Appellant.

CERTIFICATE OF SERVICE

I, Nicholas S. Hare, one of the attorneys for the said appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1967, I served copies of the foregoing Brief for Appellants by mailing in duly addressed envelopes, with first class postage prepaid (airmail where necessary), to the following attorneys for appellees:

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EXHIBITS (Newspaper Articles)

THE NEW YORK TIMES,
SATURDAY, SEPT. 28, 1963.

Prison Racial Fight Injures 23 Upstate; 450 Join in Melee

COMSTOCK, N. Y., Sept. 27 (AP) — About 450 white and Negro prisoners fought each other with fists, stones and timbers today at the Great Meadow Correctional Institution, about 70 miles north of Albany.

The State Correction Department said the racial brawl was a reflection of tensions outside prison walls.

The prison reported tonight that five guards and 18 inmates had been injured, none seriously.

A guardhouse in the prison yard was wrecked, and the inmates wielded the timbers as weapons, Superintendent Joseph P. Conboy said.

Guards using tear gas stopped the fighting within 15 or 20 minutes, and no shots were fired, the Correction Department said. The prisoners, who had been in the yard for a recreation period, were immediately locked in their cells.

Correction Commissioner Paul D. McGinnis said in Albany that there was "no question" the fighting was said that apparently colored prisoners wanted to show support of members of their race outside of prison.

He said it was believed the fight started with a quarrel over use of handball and basketball courts. Some courts at the prison are integrated and some are segregated — by actions of the prisoners themselves — Mr. McGinnis explained. There has been some problem lately, he said, over who may play on which courts.

Great Meadows, a medium-security prison, has 1,400 prisoners. They are mostly men who have been transferred from reformatories or other prisons.

TRENTONIAN
JUNE 11, 1963

RAHWAY PRISON RACE TENSIONS RISE

RAHWAY (UPI) — Seven hundred inmates at the state prison farm here refused to go to work today in a dispute which a prison spokesman said resulted from racial tensions involving Black Muslims.

The 700 prisoners — more than half of the institution's

call and jammed the infirmary for examinations.

The institutions and agencies department said it was the second day that the men had staged a non-violent protest demonstration.

Last Thursday, it was disclosed, most of the men staged a hunger strike and refused to eat the meal of the day.

The prison spokesman described the demonstration as a direct result of a "teriffic struggle for power" at the prison between white and black extremists.

The growth of the Black Muslim movement at the prison, he said, has resulted in the formation of a counter-movement of white fascists.

There have been no physical clashes yet but prison officials were reported concerned over the manner in which the situation has steadily worsened.

The striking prisoners presented a petition protesting insufficient work programs, the food, racial discrimination in the prison shop and other grievances.

The petition was submitted to Gov. Richard J. Hughes, the seven justices of the State Supreme Court, Institutions and Agencies Commissioner Lloyd W. McCorkle, Prison Superintendent Warren Pinto and the prison board of managers.

TRENTONIAN
JUNE 17, 1967

PRISON HIT BY RACE STRIFE

RAHWAY — Racial incidents broke out in the State Prison here and in Rahway yesterday and institutions officials moved quickly to stem any violence. Inmates at both prisons were locked in their cells and State Institutions officials said 41 "ringleaders" had been moved to county jails near both prisons.

A spokesman for the department announced the riot prevention measures were taken at 10:30 p.m. and said they would remain in effect "until things quiet down." He blamed the disturbances on racial tensions but said racial discrimination wasn't a factor.

The action was touched off by an unruly demonstration by convicts yesterday during the recreation period at the state prison. Six hundred convicts reported "sick" at the Rahway Branch a week ago.

Lloyd W. McCorkle, institutions and agencies director, ordered the prisoners confined to their cells last night after a day-long series of conferences. All recreational activity was suspended.

The spokesman said the demonstrations were "a device to bring pressure on institutional officers" and the State Board of Managers to force them to abdicate their statutory responsibility for the safe custody and welfare of all inmates.

Last week, a self appointed inmate committee of 18 men presented a list of grievances to officials at Rahway. The incidents were said to involve mainly pushing, shoving and shouting but no violence.

THE NEW YORK TIMES, SATURDAY, JULY 9, 1966.

1,000 Riot 2 Hours in Baltimore Prison

BALTIMORE, July 8 (AP) — Inmates rioted for two hours today at the Maryland Penitentiary, setting fire to four buildings, throwing rocks, bricks and clubs, and looting the commissary.

Authorities used tear gas to subdue 1,000 prisoners who were loose in the yard at the height of the riot. Baltimore policemen stood by with riot guns, but none of the guns were fired.

About two-thirds of the 1,461 inmates at the prison are Negroes. Officials said some inmates charged the guards used brute force, and a state legislator said the rioting had racial overtones.

The warden said the basic reasons for the riot were the recent heat wave, overcrowding and living conditions in the prison.

An assistant warden, three inmates and several firemen were overcome by smoke during the riot and 50 persons suffered cuts and abrasions.

Vernon L. Pepersack, the State Commissioner of Correction, called the riot "the worst in terms of destruction I have ever seen" during 29 years of prison administrative work in Maryland.

But Mr. Pepersack said it was "not assaultive" in the sense of violence, noting the prisoners were armed with clubs, baseball bats and other weapons, which they did not use on prison personnel.

In addition to setting the fires, the inmates looted the commissary and tore down a guard shack. They were prevented by fire hoses from entering the power station.

"The riot had to have racial overtones," said Joseph Bullock, a member of the State House of Delegates and a member of the committee on prisons.

"It stems from people on the outside," Mr. Bullock said. "If they don't stop telling these prisoners about their

rights it is going to get worse."

"The aspect of civil rights and civil disobedience outside has found its way into the prison community," said Mr. Pepersack. All outside behavior carries over into prison. Nothing new starts in prison."

The riot was the second major incident in nine months at the maximum-security institution, situated a few blocks from the heart of downtown Baltimore.

Warden Roger B. Copinger said there was "no strife between Negroes and whites" within the institution.

"The Negroes long have had complaints about so-called rights," Mr. Copinger said. "For example, one grievance is that all three members of the parole board are white. But now we have a new twist. The whites say we are showing too much favoritism to Negroes."

In October, 1965, about 700 prisoners staged a one-day sit-down strike. Earlier this year, Franklin Bough was replaced as warden by Mr. Copinger after charges that inmates were leaving the institution for unauthorized purposes.

Last month, Gov. J. Millard Tawes asked James V. Bennett, retired director of the United States Bureau of Prisons, to make a thorough survey of the administrative procedures and practices of the Maryland correctional system.

Mr. Bennett agreed only to look into the work-release program of prisons in the state.

State Senator Verda Welcome, a Negro, talked with inmates after order was restored.

"They named several guards as being brutal," Mrs. Welcome said. "Some of the Negro guards are the guilty parties. The prisoners had nothing but praise for Warden Copinger and Assistant Warden James Jordan."

Mr. Jordan was one of those who suffered smoke inhalation. Mr. Copinger said he was overcome when he went to the rescue of two inmates in the burning commissary.

A riot plan was put into effect at the prison yesterday after a Negro inmate had been subdued by guards when he was not at his assigned job and resisted efforts to take him to a cell block.

Warden Copinger said rumors swept the penitentiary that the guards had used unnecessary force in subduing John E. Jones, 24 years old, of Baltimore. Jones was transferred to the Maryland House

of Correction after being treated for bruises.

Mr. Pepersack said a group of prisoners tried to incite about 800 others to riot in a recreation yard yesterday by accusing the guards of mistreating the prisoner. Extra guards were ordered out, and the inmates returned to their cells.

At a three-hour meeting at the penitentiary tonight, 19 inmates related their grievances.

William B. Harris, the director of community relations for the Baltimore city police department who acted as moderator, promised the inmates they would receive answers to their complaints in a reasonable time.

THE NEW YORK TIMES, TUESDAY, JUNE 11, 1963

RAHWAY INMATES STAGE PROTEST

Food and Pay Head List of Prisoners' Complaints

Special to The New York Times

TRENTON, June 10 — Six hundred inmates at the Rahway State Prison Farm staged a four-hour demonstration today, the third this month.

The protest ended after Lloyd W. McCorkle, State Commissioner of Institutions and Agencies, met with 18 unidentified prisoners, described by him as leaders of the group. The inmates reported sick this morning and failed to join prison work details. There are about 1,100 inmates at the prison.

The spokesman for the group told Mr. McCorkle that their food was inadequately prepared. He also asked for an increase in the standard pay of 17 to 55 cents a day and for more parole hearings, the Commissioner said.

All of the 600 men later appeared in the mess hall for lunch.

On Sunday, June 2, about 400 inmates, all Negroes, gathered in small groups in the prison recreation yard. They squatted on the ground and listened to speeches by fellow inmates urging support for the Black Muslim sect, according to a spokesman for the Department of Institutions and Agencies.

On last Thursday, the spokesman said, almost all of the inmates refused to appear for dinner in the mess hall. In recounting these and today's incidents, he attributed the three demonstrations to racial tension.

However, Mr. McCorkle denied knowledge of racial tension at the prison farm. The complaints "added up to the usual gripes," he said.

It was at the Rahway in 1952 that violent riots broke out and spread to the maximum security New Jersey State Prison here. At that time, there was bloodshed and considerable damage to prison equipment.

About 62 per cent of the inmates at Rahway are Negroes, Mr. McCorkle said.

THE EVENING CAPITAL
FRIDAY, MARCH 24, 1967

Prisoners Indicted In Sexual Assaults

Twenty-six prisoners at the Maryland House of Correction have been indicted by the Anne Arundel County Grand Jury for sexually assaulting four other inmates during a riot at the institution on Jan. 28.

The accused, all Negroes, are charged with assaulting four white prisoners. The charges include sodomy, assault and battery and perverted sex practices.

One indictment charges that 17 prisoners assaulted one 19-year-old inmate. Another accuses nine others of attacking a 20-year-old.

County Prosecutor Julian B. Stevens said the 90-minute riot was a "sexually motivated outburst." He said he did not feel it was a "riot against the administration of the House of Correction or any defect in the administration.

The uprising started with an attack on a guard after some 50 inmates left a meeting at which they discussed grievances with warden John P. Garrity. About 100 inmates participated in the riot which was quelled by State Police.

Officials said they were let out of their cells by fellow prisoners.

(Associated Wire Service Dispatch)

ANNAPOLIS, Md., March 23 (AP)—The Anne Arundel County Grand Jury indicted 26 prisoners today on charges of sexually assaulting four others during a riot Jan. 28 at the house of correction.

Bust it
§G 118BA

Telegraph Editors: Portions of the following story may be considered objectionable.

The AP Baltimore

—0—

ANNAPOLIS, Md., March 23 (AP) — The Anne Arundel County Grand Jury indicted 26 prisoners today on charges of sexually assaulting four others during a riot Jan. 28 at the house of correction.

The accused men are Negroes and the four attacked white.

The 26 are charged with sodomy, assault and battery and perverted sex practices.

One indictment charges that 17 prisoners assaulted one 19-year-old inmate. Another accuses nine of attacking a 20-year-old.

Julian B. Stevens, county prosecutor, described the 90-minute riot as a "sexually motivated outburst." He said he did not feel it was a "riot against the administration of the house of correction, or any defect in the administration.

"It was a riot during which horrible sexual assaults occurred in great numbers," agreed Robert C. Sweeney, Deputy State Attorney General, "but it was a riot."

He said it "had its beginnings with an attack on a guard."

The uprising started after about 50 inmates left a meeting at which grievances were discussed with Warden John P. Garrity.

Officials said one inmate grabbed keys from a guard and opened the cells of others. About 100 prisoners participated in the outburst which caused an estimated $20,000 damage.

It was quelled by state police.

TRI 1050PES

THE SUN, BALTIMORE, SUNDAY, JAN. 29, 1967

State Police Quell 1 1-2 Hour Riot Involving 100 Jessup Inmates

Outbreak Begins After Guard Is Robbed Of Keys To Cell

JESSUP, Md., Jan. 28 (Special)—An estimated 100 inmates of the Maryland House of Correction rioted here tonight for about 1½ hours, setting numerous small fires and breaking open the main water pipe in their cell block.

Prison officials late last night estimated damage from the riot at about $20,000, mostly caused by water.

The riot started about 7 P.M. after a group of about 50 inmates left a meeting with Warden John P. Garrity to discuss grievances, shoved a prison guard and stole his keys which allowed them to free other inmates from their cells.

Three prison guards were reported "bruised" at the outset of the riot and at least one prisoner was removed from the four-tiered West Wing of the men's prison to which the riot was confined.

State Police Move In

The riot ended about 8:30 P.M. when some 100 State police, carrying billy clubs and wearing riot helmets, entered the cell block and ordered the rioting inmates back to their cells.

The men went willingly, according to Col. George E. Davidson, chief of operations of State Police, who added that his men entered the cell block as a "show of strength."

Warden Garrity said he thought the riot was a spontaneous outbreak and had "not been planned."

He declared firmly, however, that some of the inmates were under the influence of drugs, and he said, "I'm going to find out who is under the influence . . ."

He said there was a lot of water spilling from the walls of the cell block and a number of small fires burning. "There was a lot of noise and chaos," he said.

Warden Garrity said the men burned mattresses and "everything burnable," but that guards manning hoses at the institution were able to douse the fires before they spread to the building.

"They were tearing the place up, just like they did two years ago," Warden Garrity said. Inmates at the House of Correction staged a three-hour riot on October 23, 1964, causing an estimated $50,000 in damage.

In that riot, twelve prison guards barricaded themselves inside cells in an effort to pro-

tect themselves from the prisoners.

Firemen Summoned

For last night's riot, firemen were summoned from Jessup, Ocenton and Brooklyn. State Police were summoned from Waldorf, Annapolis, Glen Burnie, Bel Air, Waterloo, and Frederick barracks. State Police K-9 units were also called and the barks of dogs rang through the cell block.

In a press conference about . . . ., Colonel Davidson said the riot was "different from others" in that inmates did not at first quiet down to listen to prison officials and police over loudspeakers.

"This time they were loud, noisy, boisterous and they didn't pay any attention to demands that they go back to their cells," the State Policeman said.

The chain of events leading to the riot started about 6:30 P.M., Warden Garrity said, when he was called to an auditorium to meet with a group of inmates who said they wanted to talk with him about grievances.

The list included these things:

1. "Lousy food." The warden said one of the inmates told him, "You should have to eat this food."

2. There was no vocational rehabilitation program at the prison.

3. Prisoners wanted to talk with "an outsider" about conditions within the prison.

They specifically named Francis B. Burch, State Attorney General, who recently called for a complete investigation of the State's penal system. Mr. Burch offered immunity to convicts who talked about conditions.

4. They wanted a wire screen removed from what they called a "segregation section" of the cell block in which some prisoners are isolated from others.

5. Many prisoners, especially Negroes, objected to being called "boy."

One Inmate's Treatment

Warden Garrity said the talk session with him "seemed to stem from an inmate they thought was not being treated right." He did not elaborate.

"They didn't like the way the institution is being tightened up," the warden said, also not going into further detail.

As the meeting ended, the warden said he asked the men to return to their cells.

"I said if they didn't have faith in me, that's their business," he said, adding that he told them he would "look into their grievances."

On their ways to the cells from the meeting, several inmates shoved a guard on one tier and took his keys. Many

inmates in the cellblock did not take part in the riot, however, some by choice and others because the free inmates were unable to unlock their cells.

Prison officials said the West Wing held 703 men. The entire House of Correction — popularly known as "The Cut" — currently has 1,743 inmates and is considered to be overcrowded.

After the prisoners had been locked in their cells, prison officials led reporters through the area, which smelled of smoldering mattresses, pillow cases and bed linen and was covered with water.

Prisoners yelled to reporters that the one inmate injured in the riot had been accidentally hit on the head with a piece of pipe and that fourteen stitches were needed to close the cut.

State Police said that in the early stages of the riot, prison guards had squirted some inmates with fire houses attempting to herd them back to their cells.

There was little evidence of fire, damage, except for the beds.

One prisoner, who said he didn't take part, told a reporter: "You never know when a man's life will be involved. Thank God no one was killed."

As State Police started their search of cells, Robert F. Sweeney, deputy attorney general, appeared at the prison.

Then, a few minutes past 10 P.M., Mr. Burch, with whom inmates said they wanted to talk, showed up dressed in a tuxedo.

He, Mr. Sweeney, Warden Garrity, Vernon L. Papersack, commissioner of corrections, and other prison and State Police officials went in to a closed meeting to discuss the riot.

On November 26, 1966, inmates rioted at the nearby Maryland Correctional Institution for Women in Jessup. Two prisoners escaped, but were later captured during that flare-up.

On July 8, 1966, rioting inmates set fire to several shops at the State Penitentiary in Baltimore.

On April 12, 1966, two inmates were shot during a riot at the Maryland Correctional Institution in Breathedsville, Washington county.

MARCH 24, 1967

23 Are Indicted In Jessup Riot Sexual Assaults

(Annapolis Bureau of The Sun)

ANNAPOLIS, March 23 — Twenty-three prisoners were indicted today by an Anne Arundel county grand jury for sexual assaults on four other inmates of the House of Cor-

rection in Jessup during the January 28 riot at the penal institution.

Seventeen of the prisoners named in one of the indictments were charged with assaulting one 19-year-old inmate. A 20-year-old was attacked by nine of his fellow prisoners, according to another indictment. Some of the prisoners were accused of sexual assaults on more than one victim.

The 23 accused men were indicted on four counts each of assault and perverted sex practices.

Only Indictments

Julian B. Stevens, Jr., the county prosecutor, and Morton Sacks, an assistant State attorney general, both said there would be no further indictments as a result of the riot.

Mr. Stevens today called the 90-minute riot at the Jessup institution a "sexually motivated outburst."

He said he did not believe, after studying reports of the State Police investigation, that it was "a riot against the administration of the House of Correction, or any defect in the administration."

"Could Not Agree"

However, Robert C. Sweeney, deputy State attorney general, said he "could not agree with that characterization" after he was told today of the indictments.

"It was a riot during which horrible sexual assaults occurred in great numbers," he said, "but it was a riot."

Mr. Sweeney, who was one of the State officials called to the scene of the trouble January 28, said the riot "had its beginnings with an attack on a guard," and that resentment over the confinement of a prisoner in "the hole" had been a factor also.

After Grievance Meeting

It was noted at the time that the riot erupted just after a group of 50 inmates left a meeting with Warden John P. Garrity to discuss grievances.

Prison officials said one of the inmates grabbed a guard's keys while the group was returning to the four-tiered West Wing of the men's prison, and used the keys to free many other men from their cells.

JANUARY 31, 1967

Inmate Hurt At 'The Hole'; Burch Begins Full Probe

By STEPHEN A. BENNETT

The State's attorney general acknowledged yesterday that an inmate injured Saturday night at the Maryland House of Correction was struck on the head in "The Hole" area after he allegedly attacked a guard.

Francis B. Burch, the attorney general, said he was making a "very, very complete investigation" of the incident.

The inmate, William H. Wills, was in good condition at the Maryland Penitentiary hospital yesterday. Mr. Burch said the inmate suffered head cuts and back scrapes.

Happened After Riot

The incident occurred after the 1½ hour riot.

Mr. Burch said the inmate allegedly struck a guard and was taken to "The Hole" area of the prison, where unruly inmates are kept in solitary confinement.

Earlier, prison officials had indicated that Wills was injured during the riot.

Mr. Burch also said one or two shotgun shots were fired above inmates' heads during the riot as a warning to keep them from getting to key boxes.

He said he had not yet received a report from the State Police and therefore had reached no conclusions about the riot.

The attorney general said Wills, inmates in the area, and guards had been questioned in connection with the incident in "The Hole."

He also confirmed that three inmates had been "seriously" sexually attacked during the rioting. Prison sources say this is not an infrequent occurrence.

Cause Alleged

Mr. Burch said he had no knowledge of reports that the rioting began after another inmate had been threatened with being put in "The Hole."

The inmate had sworn at a guard, the guard claimed. Another officer was called to put the inmate in "The Hole."

At that point, sources said, the inmate ran from tier to tier of the West Wing of the prison and in the process got a knife. No one approached him.

Later, prison officials decided to feed inmates in other tiers, but not those in the tier in which the inmate with the knife was standing, sources continued. They said the inmate then climbed up to another tier and mingled with others who were allowed to eat.

After dinner, about half the inmates returned to their cellblock while the others began protesting about the threats to put the inmate in The Hole.

The men had been ordered out to talk over their complaints, sources said, when the inmates tore a gate off the auditorium, entered and sat down. They demanded to see Warden John P. Garrity.

Rioting Starts

After Mr. Garrity had talked to them and told them to return to their cells, they began to riot.

More than 100 inmates participated in the rioting, which caused an estimated $20,000 worth of damage, according to Warden Garrity.

About 100 State troopers, using dogs, clubs and riot helmets, used a show of force and firehoses to drive the inmates back into cells.

The institution is at Jessup, about 15 miles southwest of Baltimore.

THURSDAY, JAN. 19, 1967

'Wall of Fire'

Thousands of Cons in 'War' At San Quentin

A "massive racial confrontation" between armed white and Negro convicts at San Quentin was finally broken up yesterday after 3½ tense, touch-and-go hours.

Warden Lawrence Wilson said his guards threw up "a wall of fire" with an assortment of weapons to keep 1400 whites separated from 1000 Negroes.

The warden said the two groups got within 50 feet of each other in the Main Yard but "we fired a lot of rounds of ammunition describing limits for people."

Eight convicts were hit by bullets or richochet slugs and taken to the prison hospital, but it was not known how serious their wounds were.

Another five prisoners received "head wounds" from other weapons and one convict was treated at the hospital for a heart attack.

CLUBS

The convicts on each side, the warden said, were armed with pieces of pipe, wooden clubs, rocks and even mess hall trays to be used as shields.

"The reason the two groups were kept apart was simply because of our firepower from the catwalk," he said.

Guards manning the catwalks surrounding the Main Yard fired shotguns, sub-machineguns, rifles and tear gas to keep the two booing, cursing groups apart.

Other convicts armed themselves with prison-made dirks and knives. Some carried trays from the mess hall as shields.

Walter Dunbar, head of the State Department of Corrections, arrived at San Quentin from Sacramento to make a personal inspection of the prison.

Dunbar, who said he was urged to make the trip by Governor Ronald Reagan, praised the control work of prison authorities.

"People here at San Quentin know their job," he told newsmen. "They acted decisively and without them it could have been a major riot."

Black smoke was observed belching from the interior of the main part of the prison shortly after the trouble began at 12:30 p.m.

It turned out that convicts had set fire to some wooden classrooms in the West Block annex. The fire was quickly extinguished.

Reinforcements were sent by the Marin county sheriff's office, the State Department of Corrections and the California Highway Patrol.

Patrol Commissioner Harold Sullivan was reported to have ordered 260 of his officers to the prison and placed another 200 on standby alert.

CURSING

Sounds of cursing, booing convicts and, eventually, the sound of rapid-fire shooting could be heard a quarter of a mile away.

Warden Wilson appealed to the white faction time and again to move from the Main Yard to another area known as the Lower Yard.

The convicts at first refused. Eventually some of them were dragged by guards in the direction of the Lower Yard while others were herded in that direction by the shooting.

MOVE

As soon as the white faction had left the Main Yard, according to Associate Warden James Park, the Negro faction agreed to enter the East Cell Block.

"The danger is over for today," Park announced about 4 p.m.

The mass of white convicts sent to the Lower Yard at first refused to return to their cells, but by late last night all had been shifted in groups of about 25 back to their lock-ups.

Yesterday's trouble at San Quentin was described as an outgrowth of five days of disturbances and violence that began last Saturday with the firing of a dozen convicts from their jobs in the food department.

PROTEST

Monday, Black Muslims were reported trying to organize a general strike in protest against the firings.

During this period a white convict, Robert Holderman, 29, was fatally knifed in the prison yard and another white convict, William E. Walker, was stabbed.

Tuesday, 800 or 900 of the prison's 1200 Negro inmates refused to go to work. And Tuesday night, authorities said, a white convict was beaten by a group of Negroes.

TALKS

Associate Warden Park, who described yesterday's near-riot as "a massive racial confrontation," said very few convicts will be allowed in the yards today.

"We're going to have to talk individually with each one of these men and try to cool this thing," he said.

A Racial Strike at San Quentin

An uneasy peace prevailed at San Quentin Prison yesterday.

Guards were held overtime to increase security at the crowded institution, and no incidents of violence were reported.

A majority of the prison's 1200 Negro convicts refused to leave their cells and report for work, however.

Associate Warden James Park said the men were afraid of retaliation by 100 to 150 Black Muslims and "hard-core Negro convicts."

Trouble at the prison began Saturday when authorities fired about a dozen Negro, Mexican-American and Caucasian convicts from their jobs in the food department.

There followed an explosion of violence in the fog-shrouded prison yard on Monday that resulted in the knifing death of one white prisoner and facial cuts for another.

Yesterday morning when prisoners were supposed to leave their cells and report to their various places of employment about 800 to 900 Negro prisoners refused to go to work.

Warden Park said he understood the men were afraid of the Black Muslims and hoodlums who wanted to continue the food department squabble.

500 Pounds Weapons

SAN QUENTIN (AP) — Guards picked up 500 pounds of weapons today in the San Quentin Prison yard where convicts dropped them after gunfire broke up a threatened mass racial clash Wednesday.

FRIDAY, JANUARY 20, 1967

Cell-Block Fires At San Quentin

By CHARLOTTE RIZNIK

Convicts locked in San Quentin's south cell block lit 50 small fires of protest yesterday, cursed their guards and hurled debris from the cells.

Flaming papers were tossed from the upper tiers and quickly extinguished when they reached the ground.

The south cell block was the only part of the riot-torn prison where trouble was reported yesterday.

LOCKUP

This was because most of the prison's 4000 restless inmates were kept in their cells

throughout the day as a precaution against a repetition of Wednesday's near race riot.

The prisoners were fed sandwiches and told that perhaps today some would be allowed to go to the mess hall for a hot meal.

Only 62 condemned men on Death Row, 60 disciplinary cases in the Adjustment Center and 126 well-behaved inmates assigned to the ranch ate normal meals yesterday.

Warden Lawrence Wilson took to the air yesterday and broadcast over The Gray Network (the prison radio system) a review of Wednesday's trouble.

When Warden Wilson had finished his talk about 3:30 p.m. the disturbance on the south cell block ceased.

It was necessary for the guards to shoot, he said, in order to keep the opposing mobs of whites and Negroes from tearing each other to pieces in the Main Yard.

The warden said the locked-up convicts should share with him a debt of gratitude for the way the custodial staff handled the touchy problem.

Some 15 convicts were wounded in the melee; seven by gunfire and eight by clubs.

The 1000 Negroes congregated at one end of the Main Yard and the 1000 whites gathered at the other end had armed themselves to the teeth.

A shakedown of the yard and individual cells Wednesday night and early yesterday turned up some 1500 pounds of weapons.

There were prison-made knives, mess-hall forks twisted into brass knuckles, clubs, socks filled with rocks, lengths of pipe, screw drivers and scissor halves.

"You can always get a weapon around here," was the warden's droll comment as he surveyed the piles of lethal objects.

Wilson is still not entirely sure who was responsible for the riotous condition or the exact nature of its underlying causes.

It is hoped that conversations with almost all of the prison's 4000 convicts will provide a clue to these questions.

About one third of San Quentin's prison population is Negro.

The prison, as Warden Wilson explained, is subject to the same racial tensions that plague the entire Nation.

Race relations at the prison have been reasonably calm for some time due to a deliberate effort by the administration to promote racial understanding.

Group counseling, recreation hall conferences, seminars and visiting speakers have been used at San Quentin to combat racial prejudice.

During the past few days, racial tension at San Quentin built towards a breaking point due to a series of events.

This tension culminated Wednesday in the Main Yard where the huge groups of angry whites and angry Negroes faced each other for 3½ hours.

By keeping most of the prisoners locked in their cells yesterday and again today, Warden Wilson hopes passions will cool and the prison routine can be restored.

THE SACRAMENTO BEE

Tuesday, January 17, 1967

San Quentin Prisoner Is Slain

SAN QUENTIN (AP)—A white prisoner was stabbed fatally in a disturbance that broke out in a fog-shrouded San Quentin recreation yard early Monday after Black Muslim convicts called for a general work stoppage at the prison.

Robert N. Holderman, 29, of San Francisco, serving six months to 14 years on a forgery conviction, was stabbed twice in the chest and bludgeoned on the head. He died some hours later in the prison hospital.

William E. Walker, 30, of Del Norte County, serving five years to life for burglary and escape, was cut and bruised but was reported in satisfactory condition.

Associate Warden James W. L. Park said the Black Muslim faction called for a general strike in protest over removal of five men from mess hall duty on Saturday.

The disturbance erupted shortly after, Park said, and was quelled quickly although in the thick fog "we had our problems finding out what was going on."

Parks said 45 men, including the Black Muslim protest leaders and those who heeded their call to stop work, were locked in their cells.

Later 200 to 300 unassigned prisoners were locked in their cells as a move to keep yards clear while an investigation is carried out.

Parks said all but a small minority of the prison's 4,000 convicts continued at work.

THE SACRAMENTO BEE

Wednesday, January 18, 1967

Convict Strike Continues At San Quentin Prison

SAN QUENTIN (AP)—San Quentin prison officials today tried to break what they called a hardened convict group's grip of terror over 900

Negroes who refuse to report to their prison jobs.

Interviewers tried to uncover the leaders of the strike and those responsible for earlier clashes in which one white prisoner was killed and another injured.

The strikers late Tuesday heard an appeal from the warden over the prison radio system. No demands by striking convicts have been made public.

In a press release, Associate Warden James Park blamed "a combination of Black Muslims and a hoodlum element" for the trouble.

Intimidated

Park said, "We feel by and large that the vast majority of these men have been intimidated by threats and coercion by some 100 to 150 hard core prisoners." Most of the striking Negroes, he said, are "terribly fearful of retaliation if they go to work."

No incidents of violence were reported when the inmates stayed in their cells and did not report to work.

The strike involves three-quarters of the prison's 1,200 Negro inmates. The state prison holds 4,000 convicts.

Those Negroes who did not go to their jobs were locked in their cells.

A prison duty officer, K. W. Haybal, said that most of the prisoners work at jobs connected with maintenance of prison operations. He cited the food services, industries, shops and plants.

Hayball said, "The main jobs are getting done but the strike makes it more difficult."

Start Of Trouble

Trouble started at the prison last Saturday when authorities fired a half dozen Negro, Mexican-American and Caucasian convicts from their jobs in the food department. Officers said the work was not being done properly.

Violence erupted Monday when some of the Negroes tried to stop work. In a dense fog cloaking the prison yard, they attacked two white workers who insisted on going to their jobs.

Robert Holderman, 29, a San Francisco forger, was fatally beaten and stabbed. William E. Walker, 39, a Del Norte County burglar, was beaten.

Uneasy Quiet At San Quentin— Cons in Lockup

An edgy peace continued at San Quentin yesterday for the fourth day since last Wednesday's massive racial confron-

tation between thousands of Negro and white convicts.

All the prison's 4,000 inmates, except for some 200 maintenance workers, remained locked up in their cells. And prison guards were still working 12-hour shifts.

Officer of the day, Joe O'Brien, said the prison's huge population is being fed hot meals in batches of 300 in the south dining room. It takes some two and a half hours to feed everyone by this procedure.

TUESDAY, JAN. 24, 1967

Some Convicts At San Quentin Back at Work

The cells of 700 "hand-picked" convicts were unlocked at San Quentin yesterday so the men could return to their prison jobs.

It was the largest work force assembled since last week's massive racial confrontation in which 1000 whites and 1000 Negroes faced each other with weapons.

Warden Lawrence Wilson said there will be "a gradual unlock" at the prison until some 3600 prisoners are back at their jobs.

January 19, 1967

Shots, Gas Balk Race Clash Of 2,800 Quentin Convicts

By JACK SCHREIBMAN

SAN QUENTIN, Calif. (AP)—Guards firing rifles, shotguns and tear gas canisters prevented a racial clash between 2,800 white and Negro convicts in the San Quentin Prison yard Wednesday night as the two groups came to within 50 feet of each other.

Eight convicts suffered gunshot wounds during the tense hours following a glaring face-down of the two groups. Five others suffered head wounds from beatings by other convicts. Two men incurred heart attacks.

The confrontation included one group of more than 1,000 whites and Mexican-Americans and another group of about 1,800 Negroes.

Officials said the turmoil grew out of the fatal beating and stabbing of a white prisoner last Monday.

Trouble started after lunch Wednesday, said Associate Warden James W. L. Park, when inmates entered the football field-sized yard. Whites and Mexican-Americans gathered on one side, Negroes on the other. They drew closer,

hurling curses across the no-man's land. Elsewhere on the grounds of the 40-acre prison, another 1,200 inmates tended to their duties.

With the angry convicts separated by only 50 feet, Warden Lawrence E. Wilson mounted the gunwall surrounding the yard and ordered, "Knock it off and go back to your cells."

There was silence, and no one moved.

Park said many of the men had armed themselves with pipes from plumbing ripped from prison facilities, and clubs from benches torn apart in the yard. A temporary classroom building made of wood was set ablaze.

Guards were ready to throw up a "wall of fire" with bullets if the factions got any closer, but it wasn't necessary, Park said.

The two groups surged. Messhall windows shattered. Guards fired warning shots into the air. By this time 500 prison guards and personnel took up posts, aided by a contingent of 65 men from the Marin County sheriff's office and the California Highway Patrol. Gov. Ronald Reagan made more than 200 other highway patrolmen available.

Refused For Three Hours

For nearly three hours the two groups refused to obey orders.

"No one seemed to want to make the first move," Wilson said.

Finally, tear-gas canisters were thrown and the Negroes, prodded by warning shots whining through the air, let themselves be herded back to their cells.

The remaining group of whites and Mexican-Americans stayed in the lower yard for about seven hours. Smoke billowed out of the yard as they burned benches to keep warm in a chilling fog that moved in.

They wore only dungarees and light shirts. In the late afternoon, one man was hit in the mouth by a richocheting bullet, Park said. Below the main gate, as Wilson gave a news conference, a flurry of shots were heard.

"Some of the men probably went where they weren't supposed to go," he said.

At 7:15 p.m., another staccato burst of shots rang out. Four men were wounded in this, it was explained, mostly around the legs. At about 8:30 p.m., guards began moving men back into their cells in groups of 25. And 2½ hours later all had been returned to cells and the

prison was pronounced "secure."

Supper for the convicts Wednesday night was cold sandwiches served in their cells. That would be the fare for most of the inmates today.

Trouble Began Saturday

Trouble started last Saturday when prison officials fired six Negroes, Mexican-Americans and whites from their jobs in the food department for misbehavior.

Park said that led to the stabbing and beating last Monday of Robert Helderman, 29, during a Black Muslim demonstration in the prison yard. He died later that day. On Tuesday about 900 Negroes refused to work. Park said they were terrorized by a hard-core group of hoodlums and Black Muslims. Wednesday before the blow-up, 200 men still refused to work.

'Scared To Death'

Park told newsmen he believed "85 to 90 per cent" of the men in the yard during the confrontation were "scared to death" about what was happening but would not cooperate with officials over fear of retribution.

Park said the prison administration now had a massive and tedious job before it of digging out the troublemakers and punishing them.

JANUARY 20, 1967

San Quentin Convicts Undergo Interviews In Probe of Rioting

SAN QUENTIN (AP) — San Quentin Prison officials are interviewing a large number of convicts today seeking to determine the specific causes of a local clash.

Warden Lawrence Wilson said Thursday the prison is subject to the usual racial tensions that plague other parts of the nation.

About 1,000 Negroes gathered at one end of the prison's main yard Wednesday and 1,000 whites gathered at the other. Wilson said both groups were "armed to the teeth."

Guards firing rifles and shotguns kept the two groups from converging although eight convicts were wounded by bullets and five others beaten in brawls.

The prison's 4,000 inmates about one third of them Negroes were locked in their cells Thursday.

Only in the south cells where convicts started about 50 small harmless fires and cursed guards was any trouble reported.

After Wilson talked with the prisoners over the prison's radio system the south cell also quieted down.

The prisoners were served sandwiches in their cells.

Wilson said most of the prisoners are still being kept in the cells again but that perhaps some would be allowed to go to the mess hall for hot meals.

Friction first appeared Saturday when six men including both whites and Negroes were fired from food department jobs for misbehavior.

That led to a prison strike which Associate Warden James W. L. Park blamed on Black Muslims and hoodlums.

JANUARY 22, 1967

San Quentin Is Slow Returning To Normal Day

SAN QUENTIN, Calif. (UPI) — Prison life in race-tense San Quentin became a bit more normal Saturday, but officials said "we have a long way to go."

The big institution's 4,000 inmates got two hot meals, with 300 men at a time in the dining hall. Heavy guard units continued on duty to head off any build-up towards a racial confrontation like the one which occurred Wednesday.

"Things are moving slowly back to normal," said M. R. O'Brien, of the warden's office, "but we feel we have a long way to go to find the roots of the trouble."

Prisoners still were restricted to their cells except for the trip to the dining hall. But O'Brien said limited exercise periods will be introduced gradually.

In last Wednesday's incident 3,000 prisoners separated into Negro and white mobs and faced each other menacingly in the prison yard. They were armed with improvised weapons, and guards at one point had to put up a wall of gunfire to keep them apart.

THE NEW YORK TIMES, THURSDAY, MAY 23, 1963

PRISONER UPHELD ON SEGREGATION

Court Rules Whites, Too, Must Be Given Choice

ALEXANDRIA, Va., May 22 (AP) — A Federal judge has ruled that "it is equally as unconstitutional to discriminate against a white man as it is to discriminate against a colored man."

District Judge Oren R. Lewis made the ruling yesterday in a case involving plans by District of Columbia Commissioners to integrate the last all-white dormitory at their Lorton, Va., reformatory.

Judge Lewis said Negroes now had a choice between going into segregated or integrated facilities, and that white prisoners were entitled to the same choice.

On the petition of a white prisoner, the judge issued an order blocking action by the commissioners, who adopted a policy last July for integration of three formerly all - white dormitories.

The prisoner, Bernard E. Dixon, argued his own case before the court.

The judge said his order would not block integration of all 23 Lorton dormitories if the policy was applied without regard to color or creed.

Under present policy, however, he said, "Negro inmates are assigned to an integrated dormitory. White prisoners are not given this choice."

Dixon argued that integration of the all-white dormitory would violate his civil rights.

Testimony at the hearing was that the 23 dormitories now have 1,331 Negro prisoners and 169 white inmates. Judge Lewis noted in his opinion that 301 of the Negroes were members of the Black Muslim movement, which preaches black supremacy.

Dixon said white prisoners in his dormitory feared violence by Black Muslims if the dormitory was integrated and also were afraid of contracting diseases from Negro prisoners.

JUNE 11, 1963

RAHWAY INMATES STAGE PROTEST

Food and Pay Head List of Prisoners' Complaints

Special to
The New York Times

TRENTON, June 10 — Six hundred inmates at the Rahway State Prison Farm staged a four - hour demonstration today, the third this month.

The protest ended after Lloyd W. McCorkle, State Commissioner of Institutions and Agencies, met with 18 unidentified prisoners, described by him as leaders of the group. The inmates reported sick this morning and failed to join prison work details. There are about 1,100 inmates at the prison.

The spokesman for the group told Mr. McCorkle that their food was inadequately prepared. He also asked for an increase in the standard pay of 17 to 55 cents a day

and for more parole hearings, the Commissioner said.

All of the 600 men later appeared in the mess hall for lunch.

On Sunday, June 2, about 400 inmates, all Negroes, gathered in small groups in the prison recreation yard. They squatted on the ground and listened to speeches by fellow inmates urging support for the Black Muslim sect, according to a spokesman for the Department of Institutions and Agencies.

On last Thursday, the spokesman said, almost all of the inmates refused to appear for dinner in the mess hall. In recounting these and today's incidents, he attributed the three demonstrations to racial tension.

However, Mr. McCorkle denied knowledge of racial tension at the prison farm. The complaints "added up to the usual gripes," he said.

It was at the Rahway in 1952 that violent riots broke out and spread to the maximum security New Jersey State Prison here. At that time, there was bloodshed and considerable damage to prison equipment.

About 62 per cent of the inmates at Rahway are Negroes, Mr. McCorkle said.

JUNE 17, 1963

New Prison Uproar Brings Crackdown

Special to
The New York Times

TRENTON, June 16—Inmates at the State Prison here staged a noisy demonstration this afternoon that broke up a baseball game at the prison field.

The incident—the third in two weeks here or at the Rahway Prison Farm—led authorities to lock all the prisoners at both institutions in their cells and to suspend all recreational privileges.

Dr. Lloyd W. McCorkle, Commissioner of Institutions and Agencies, said the incident today "had the potential of a major disturbance."

Dr. McCorkle said 41 inmates, whom he described as ringleaders, had been transferred to county jails throughout the state. He said 1,200 prisoners at the slightly overcrowded prison here and the 1,000 at Rahway were to be screened today before anyone would be permitted out of their cells.

Dr. McCorkle said an 18-man inmate grievance committee had been critical of prison administration, but he called their grievances "harassment which we will not permit to go on." He said he expected the prison to return to normal tomorrow.

Six hundred prisoners at the Rahway farm staged a four-hour demonstration a week ago that ended when Dr. McCorkle met with the committee. But many refused to work later and 600 reported sick yesterday..

The prisoners complained that their food was badly cooked and that their pay of 17 to 55 cents a day was not enough.

JANUARY 19, 1967

4,000 In San Quentin Are Locked In Cells

SAN QUENTIN, Calif., Jan. 19 (UPI) — Nearly all of San Quentin prison's 4,000 convicts were locked in their cells today while the warden and his staff investigated a murder that almost triggered a race riot.

"Everything is buttoned up here," said a prison spokesman. He explained that only a few inmates, such as kitchen workers, hospital attendants, boilermen and sanitation personnel were released for work.

Lawrence E. Wilson, the warden, ordered the tight security measures to avert a recurrence of what took place in the main yard yesterday. Nearly 3,000 inmates — two-thirds of the prison's population—gathered into two mobs — whites at one end of the 600-foot-long yard, Negroes at the other.

Guards fired volleys of warning shots and exploded tear gas grenades to prevent a clash. At one point, a prison spokesman said, the guards used their weapons to lay down "a wall of fire" to keep the groups apart.

Eight prisoners were shot and five suffered head wounds but none were seriously injured. One inmate had a heart attack.

The disturbance, the climax of five days of mounting racial tension which included the fatal stabbing of one convict, began at noon. Ten hours later order was completely restored.

Gov. Ronald Reagan ordered more than 400 Highway Patrolmen to be ready to help prison officials. About 50 sheriff's deputies were also alerted.

JUNE 16, 1967

CINCINNATI RIOTS SPREAD TO PRISON

Inmates of Both Races Fight Guards for 3 Hours—12 Negroes Get Stiff Terms

By GENE ROBERTS
Special to
The New York Times

CINCINNATI, June 15 — Rioting spread to Cincinnati's fortress-like city workhouse today after a municipal judge handed down one-year sentences to 12 Negroes convicted of violating the State Riot Act.

For more than three hours Negro and white inmates, wielding mop handles, buckets and bricks, battled National Guardsmen, prison guards and policemen.

The police fought back with tear gas.

It was the first time whites had become involved in the four days of rioting, which thus far has resulted in nearly 300 arrests, more than $1-million in property damage and scores of injuries — four of them serious.

Refused To Move On

Today's troubles began in the courtroom of Municipal Judge William S. Mathews, who sentenced 12 Negroes to one year in the city prison and ordered them to pay $500 fines.

The police testified that the men marched around a service station shouting "black power" Tuesday night, and refused to move on after being told that the State Riot Act makes it illegal to "congregate" during a tense situation.

Judge Mathews then said that he had announced on Tuesday when the riot act was invoked that he was going to hand out maximum penalties to anyone convicted of violating it.

With that he read out the sentences. A Negro woman leaped to her feet in the courtroom and protested that the sentence was unjust. She was joined in shouting by several others including the convicted rioters.

National Guardsmen were immediately rushed to City Hall, which houses the municipal courts, to keep order. Meanwhile, policemen whisked the convicted Negroes to the workhouse.

Screaming at Prison

According to Police Chief Jacob Schott, the Negroes were screaming and shouting when they arrived at the workhouse at noon. And this, he added, touched off a riot among 409 other prisoners divided about equally between Negroes and whites, who had been complaining throughout

the morning about Cincinnati's 90-degree heat.

By 2 P.M., the prisoners were pounding on their cell doors and hurling the contents of their toilet buckets at the prison guards.

The turreted, green and white brick workhouse was buit more than 100 years ago to house Civil War prisoners, Chief Schott said, and has no plumbing facilities.

When the prisoners began setting their mattresses afire at about 3 P.M., the police fired tear gas shells into the cell blocks in an effort to herd the prisoners into the "play-pen" — prison jargon for an outdoor compound.

But once in the compound, the prisoners ripped bricks from a walkway and attacked again. The situation was not brought under control until around 5 P.M.

Demand Electricians

"It was a mess, a real mess," said Chief Schott. "A hard core of about 50 inmates were causing most of the trouble. They were throwing everything they could get their hands on."

He said the prisoners were demanding electric fans and a late night snack.

"There are already some fans in the building," police Sgt. Lewis Dahmann said. "And the guards explained to prisoners that it would do no good to turn them on because they would only suck hot air into the building."

About 50 National Guardsmen rushed into the prison with fixed bayonets and another 50 stood outside with their weapons pointed toward the prison windows.

It was a scene of vivid contrasts. A grassy mall in front of the prison is used as a public playground. And while the guardsmen ringed the building, small children laughed and played on swings only a few yards away.

Meanwhile, others in the detachment of 800 guardsmen, assigned as a riot control force, patrolled such riot-torn areas of the city as Avondale, a Negro district, and Walnut Hills and Evanston, two racially integrated areas.

Along with some 600 policemen, they were able to prevent crowds from collecting in the city's trouble spots. A few of the National Guardsmen patrolled the downtown area in jeeps, causing pedestrians to stop and stare at their battle dress, machine guns and bayonets.

The city remained tense last night, but the saturation tactics of the National Guard and the police prevented sev-

eral incidents of gunfire and window smashing from developing into full-scale rioting such as racked the city on Tuesday.

H. Rap Brown, chairman of the black-power-oriented Student Nonviolent Coordinating Committee came to the city this afternoon from Dayton, where Negroes attacked a white man last night after listening to a speech by Mr. Brown and Willie Ricks, another student committee spokesman.

A policeman reported on the police radio tonight that Mr. Brown had spoken to a small group of Negroes in one of Cincinnati's embattled areas and declared: "Snick has declared war."

Police radio announcements indicated that the Police Department was keeping Mr. Brown under close surveillance. He could not be reached for comment.

Earlier, at 3 P.M., city officials closed City Hall to minimize the risk of Negro demonstrations in protest against the one-year sentences given the 12 Negroes.

More than 100 others were also tried today on lesser charges growing out of the riot. Most of their cases were continued.

In Traffic Court, Judge George S. Heitzler fined Peter Frakes, 26 years old, $50 and costs for obstructing pedestrian traffic.

The riot started four days ago after the police arrested Mr. Frakes, who was marching along a sidewalk with a placard calling for the release of a Negro sentenced to death in the murder of a white secretary.

By Tuesday night large crowds of Negroes roamed the streets, stoning police and setting fires. The guard was called out late Tuesday night and by last night was succeeding in dispersing Negro crowds.

But the city continued to be disrupted by hit - and - run arsonists.

Last night firemen answered more than 45 fire calls and extinguished more than 20 fires. The other calls involved home-made firebombs that failed to ignite or false alarms.

Three of the fire bombings took place in Covington, Ky., which is just across the Ohio River from Cincinnati.

Rash of Fires in Dayton

Dayton, Ohio, Friday, June 16 (AP) — A rash of fires, some reportedly touched off by gasoline bombs, broke out in

Dayton's racially troubled West Side about midnight last night.

Five houses burned furiously in one neighborhood. A crowd estimated at 200 persons gathered at the scene.

Firemen said three gasoline bombs had been thrown into the Gem City Lumber Company, setting it ablaze. The lumber company was the scene of a $1,000 fire during outbreaks Wednesday night.

The police said that small bands of Negroes were roaming the streets. There were scattered incidents of rock-throwing and window-smashing.

The police said a Negro man and woman had been shot, but did not know whether the shooting had any connection with the racial outbreaks, which flared for a second night here.

Officers said a Negro man had walked up to a couple at a service station and begun shooting. Fred McCoy, 31 years old, was injured critically. His wife, Esther, 31, was listed in satisfactory condition.

Bottle-throwing and looting by Negro youths erupted Wednesday night. Police Chief C. W. Martz blamed a civil rights meeting for those disorders.

MONDAY, JULY 17, 1967

Blaze Is Linked to Breaking of Gas Line and a Lamp During Inmates' Fight

By The Associated Press

JAY, Fla., July 16—Fire, apparently started during a convict brawl, flashed through a wooden barracks at the State Prison road camp late tonight, killing 37 inmates and injuring six others.

Eight of the 51 prisoners in the aging structure escaped the fire unharmed. The six injured prisoners were seriously burned. They were taken to the hospital at nearby Century.

G. C. Mayne Jr., assistant warden at the racially integrated camp, said fighting prisoners broke a gas line inside the building. Escaping gas flared when a fluorescent lamp was broken, he said.

Guards had raced to get their guns to quell the fighting when the fire erupted, according to a guard, Cocker Nelson.

The building was destroyed within eight minutes, Mr. Nelson said.

Pasco Rowells, a foreman of the State Highway Department, who supervised the men at work, said the fight began between a Negro and a white man.

'Whole Room Ablaze'

The sheriff's radio dispatcher, H. C. Crawford, said a prisoner brought to the jail told him, "The whole room was wrapped up with fire."

"Somebody hollered 'fire'," the prisoner, Gerold Milligan was quoted as saying. Milligan, who said he had been sitting on his bed removing his shoes, said the blaze swept the whole top of the building."

"They began to pass out," the prisoner was quoted as telling officials. Milligan said he ducked under beds and crawled toward the door holding his nose.

Just as he got to the door the guard opened it and Milligan escaped with only his hair singed, he said.

Paul Skelton, assistant to the director of Florida's Division of Corrections, said it was inconceivable to him that men were killed because they were not able to get out of the prison, which he said is composed of one-story wooden buildings with no bars on the windows.

The camp is in Jay, a farming community in the extreme northwestern tip of Florida's Panhandle. The camp is about 30 miles north of Pensacola at the Alabama state line.

TUESDAY, JULY 18, 1967

Report the Plotters Wanted to 'Tear the Place Apart'

Negro and 2 White Prisoners Said to Have Started Blaze

MILTON, Fla., July 17 (AP) —Prisoners who survived a prison fire yesterday that killed 37 convicts said at an inquest today that it had been set deliberately by three inmates. They said the three had plotted to "tear the place apart."

The convicts said that the three plotters were among those killed when the blaze spread out of control inside the locked barracks building.

The convicts testified that it was about six minutes before a guard unlocked the door after the fire started. They said two white men and a Negro started the fire.

Officials had said previously that the building had been destroyed in eight minutes.

The inquest was held before County Judge Mahlong McCall in the county seat of Santa Rosa County, just 20 miles from the community of Jay where the prison camp tragedy occurred.

Crawled Under Bunk

Joseph C. Lewis, 30 years old, an inmate who said he had saved himself by ducking under a bunk and crawling to

safety once the prison's exit was unlocked, testified.

"I heard they were going to put the building out of commission."

Henry W. Lambert, a convict and cook at the camp, said, "I saw somebody turn the television off and then smash it. Then they were whacking at the fluorescent lights making them pop."

Gary Allen Powell, 19, said, "The ruckus started in the back. Someone jumped on the bed and started beating the lights out. The guard told us to put out the fire. He said he didn't have the key."

The convicts were brought into court in their prison pants, blue with a white stripe down the side, and T-shirts charred by ashes and smoke. Some of the prisoners had no shirts and one was bandaged.

Six prisoners were injured and eight escaped unharmed in the blaze that started about 10:40 o'clock last night.

Most of the dead were huddled in a shower where they apparently sought refuge under the water and at a window whose steel bars blocked escape.

Two escaped through a door unlocked by a guard but died on a lawn inside the barbed wire compound.

Louie Wainwright, director of the State Corrections Division, said, "The prison system had already planned to close Camp 12 where the fire struck. I guess it's shut down for good now."

Mr. Wainwright did not say why the camp was being closed but a similar camp, Number 9, about 20 miles away, was closed June 30, reportedly because of the high maintenance cost. An official prison commission had criticized conditions at Camp 9 before it was closed.

The latest inspection report from the burned camp filed in Tallahassee June 6 by R. B. Gramling, corrections division inspector, rated the prison from "good" to "very good" in all categories.

"This old wooden prison has received good maintenance and the building and equipment are, at present, in good shape," Mr. Gramling said.

"It seemed like an eternity," Roy G. Regan, a prisoner, said at the inquest.

"I was in bed when fire began," Regan said. "I heard the inmates screaming. I saw the fire come rolling down the ceiling. I just got under the bunk and crawled out when I heard the guard shouting, 'The door is open. Come on out'."

That guard, A. O. Lovett, went into the blazing building and herded at least five con-

victs through a curtain of flame when the prisoners apparently froze. He was burned, but not seriously, during the rescue.

Regan said, "If a man stood up in it, he would have lost consciousness from all the smoke and fire. When we got outside we took axes from the truck and cut a hole in the wall and pulled seven of them through."

Earlier, prison officials had disagreed on whether the blaze was an accident or arson.

BALTIMORE NEWS AMERICAN

MONDAY, JULY 10, 1966

Conduct Cell-by-Cell Search

SHAKE DOWN PENITENTIARY

A cell-by-cell shakedown of the Maryland Penitentiary, with special attention to weapons, was conducted yesterday as officials sought to avert a recurrence of Friday's costly riot involving 1,000 prisoners.

Warden Roger B. Copinger Jr. said inmates confined to their cells for the weekend as a result of the burning and looting spree, were moved out individually under guard while their quarters were searched.

Confiscated among other items were the stores stolen from the prison's commissary when a wedge of rioters broke in and set it afire, after three other major fires had been started.

MEANWHILE, PLANS to transfer some of the Penitentiary's over-crowded population to other state penal institutions were under way.

Attorney General Thomas B. Finan urged that inmates who started the uprising, which caused damage estimated at $500,000 "be dealt with firmly."

GOV. TAWES told The News American he would initiate no action himself until he got a full report from Vernon L. Pepersack, state commissioner of correction.

The governor, however, said he firmly believes the tense atmosphere of the overcrowded Penitentiary "will be relieved considerably," when some of the 1,500 inmates are moved to a 500-man facility just completed at the Maryland House of Correction in Jessups.

As the rest of the prison population was quietly taking its noon meal in the cellblocks, 43 inmates were transferred yesterday to the Baltimore City Jail.

Pepersack issued no comment on his plans for the transfer from the Penitentiary of other prisoners.

Ashes of major fires in its tag and print shop, woodworking shop and laundry—its mess

hall and commissary burned and sacked — the prison reeled in the throes of reorganization of work schedules and living routines.

Overcrowding of prison facilities and delay in action on parole, Finan believes were the chief causes of the riot.

And he laid the blame for both directly upon the Maryland General Assembly.

"These two problems have been brought repeatedly to the attention of the State Legislature," Finan declared.

"Their solution involves the appropriation and expenditure of substantial funds for new construction and additional personnel. This naturally means an additional burden on the taxpayer, but it may well be a wise investment."

PRISONERS yesterday were allowed to leave their cells only to take "supervised showers."

Warden Roger B. Copinger initiated a cell-to-cell search for weapons and contraband and expected it to continue through the weekend.

Copinger said damage to buildings amounted to about $200,000, and to equipment and supplies, $300,000.

A rumor in the afternoon that the riot had broken out again, resulting in the calling of Police Departments riot and motorized squads, proved to be false.

Later Rep. Carlton R. Sickles, candidate for governor, issued a statement in which he termed Maryland's penal record "dismal," its prison system, "a failure," and its prisons "archaic." He concluded:

"We have been working for some time on an overall plan to improve Maryland's long neglected penal system. We plan to release our conclusion in the near future."

DECEMBER 17, 1966

Jury Acquits Alleged 'Pen' Riot Leader

The 33-year-old accused ringleader of the July 8 Maryland Penitentiary riot that resulted in about $750,000 damages has been acquitted of riot and arson charges.

A jury under Judge J. Gilbert Prendergast deliberated for more than three hours last night in Criminal Court before finding George McChan innocent of participating in the uprising.

Two months ago, McChan won another court battle when his conviction and subsequent 40-year sentence for participating in shotgun robberies were tossed out because of a Supreme Court decision dealing with confessions.

McChan was accused of leading about 100 inmates who tried to break into the power house and eventually forced their way into the commissary, which was looted of $35,000 worth of merchand se.

NOVEMBER 22, 1966

Pen Official Gets Tight Trial Quiz

The defense conducted a rigorous and detailed cross-examination of Lambert Hardesty, a correctional officer at the State Penitentiary, as the trial of two of the 82 inmates accused of rioting at the jail last July 8 entered its second day at Criminal Court.

Hardesty, a veteran of six years at the Penitentiary, testified that he was crouched in a window and identified Cletus Bane, one of the defendants, as a rioter and looter during the violence that July day.

IN A SURPRISE move just before noon recess, Judge J. Gilbert Prendergast called both sides into conference in his chambers. There was no speculation as to the gist of the half-hour conference.

Warden Roger Copinger, the state's first witness, testified yesterday that damage was put at $750,000 in the wake of massive fires in five buildings and the looting of the commissary.

Richard Biscoe and Bane are the initial defendants in the state's action against the rioters.

HARDESTY said he saw Bane looting the commissary, helping to carry out cases of cigarets and stashing other items in a laundry bag.

Copinger said smoke first came from the metal shop, sewing and shoe repair building, then the laundry, classroom areas of another building and finally the woodworking shop — prisoners all the while running through the yard breaking windows, uprooting shrubbery and inflicting whatever damage they could.

As police surrounded the walls, guards gradually herded some 1,000 inmates into their cells and secured more and more of the prison as they moved in on about 450 of the remaining rioters.

JANUARY 29, 1967

40 Inmates Gang Up On Guards

They Then Free 200 From Cells

By JOHN JENNINGS and BYRON ROBERTS

Vicfous rioting raged through the Maryland House of Correction at Jessup last.

night after a band of 40 prisoners ganged two guards and freed 200 of their cellmates.

More than 150 helmeted state troopers swung into action with night sticks and K-9 dogs against the warring inmates and battled nearly an hour before quelling the uprising.

Damage was estimated at at least $50,000 by prison authorities.

Trucks from three Anne Arundel County volunteer fire companies sent heavy streams of water through the prison's West Wing windows as the battle raged between the inmates and the guards and police.

THERE WERE NO escapes during the riot, which was believed to have been linked to narcotics traffic in the prison.

Three guards and an inmate were injured, none seriously.

Trouble began in the West Wing shortly before 7 o'clock, when Guard James Haddaway, 42, was leading a group of men to their third-tier cells from the messhall. One of the men yelled:

"Okay, let's go!"

Haddaway was jumped from the rear, knocked down, choked, beaten and robbed of his key ring.

ANOTHER GUARD, Ronald Fassett 24, was behind the group when he saw his partner attacked. The inmates turned on him, beat him nearly unconscious and then locked both officers in a cell.

Unlocking cells as fast as they could find the right keys, the inmates began freeing other prisoners.

More than 200 men poured into the corridor — screaming curses, setting fire to mattresses and breaking whatever furniture that came to hand.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

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Birmingham, Alabama, Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

SUPPLEMENTAL BRIEF

This Supplemental Brief After Argument is filed under special leave of this Court heretofore granted on December 4, 1967.

POINT I

In the oral argument on behalf of the appellees, their attorney referred to the attitude of the present State administration with regard to segregation and argued that if discretion were left with the appellants, the end result would be the maintenance of segregation because appellant Lee was but an appointee of the Governor of Alabama and "you cannot in fact expect him to exercise his discretion and do his duty without a court order."

This argument must have been based upon a misunderstanding of the State law under which the Board of Corrections was created and operates because its chief premise, that the Commissioner and Board serve at the pleasure of the Governor, is incorrect.

The Board of Corrections of Alabama, the members of which are appellants in this cause, is created and provided for by Sections 10 (1) and 10 (2), Title 45, Code of Alabama 1940, Recompiled 1958. Its five members are appointed for staggered ten year terms by the Governor with the advice and consent of the State Senate; these members can be removed only by impeachment. Vacancies are filled by appointment by the Governor from a list of three nominees selected by the Chief Justice of the Supreme Court, the Presiding Judge of the Court of Appeals and the Lieutenant Governor. Title 45, Section 10 (2) Code of Alabama 1940, Recompiled 1958.

Title 45, Sec. 10 (1), which creates the Board of Corrections, is as follows:

"Creation and powers, etc., of board.—There is hereby created the board of corrections of Alabama, hereinafter

referred to as 'the board'. The board shall have all of the rights, powers, duties and authority now conferred upon the department of corrections and institutions and the director of corrections and institutions by Title 45, Code of Alabama 1940, as amended, and all other laws of this state. *The board shall also have all of the rights, powers, duties and authority conferred upon the governor by chapter 1 and 2 of Title 45, Code of Alabama 1940.* All such rights, powers, duties and authority are hereby transferred to the board, together with all funds, property, books, records and effects of the department of corrections and institutions and the director of corrections and institutions." (Emphasis added).

Under the provisions of Title 45, Section 10 (5), Code of Alabama, 1940, Recompiled 1958, the Board appoints the Commissioner of Corrections who is responsible only to the Board, not the Governor, and who serves at its pleasure. That statute reads as follows:

"Commissioner of corrections and deputies.—The board shall appoint a commissioner of corrections who shall serve at the pleasure of the board and shall be responsible to it. He shall be the chief administrative officer of the board and the board may delegate any of its administrative powers and authority to him. The commissioner of corrections shall be a man of good character, of good business experience and experience in the administration of correctional system. He shall have no financial interest in any partnership, corporation, or association with which the board has any financial dealings. The commissioner of corrections, with the approval of the board, shall have the authority to appoint deputy commissioners, not to exceed two, and to

define their duties. Their salaries shall each be an annual amount fixed at $1,500 less than the salary of the commissioner of corrections."

An examination of the officials of Alabama as listed in Acts of Alabama 1959, at page 1600; 1961, at page 1640; 1963, at page 1293; and 1965, at page 1671; shows that appellant Lee has served as Commissioner of Corrections under three separate State administrations. In addition, of the members of the Board, appellant Britton was appointed by Governor Persons in 1953; appellant Cashion was appointed by Governor Persons in 1953; appellant Mitch was appointed by Governor Folsom in 1956; appellant Luttrell, was appointed by Governor Folsom in 1957; and appellant McLaughlin was appointed by Governor George Wallace in 1964. Thus it is clear that the appellant Board is truly an independent one; indeed, it is reputed to be one of the most independent prison boards in the United States.

The attitude and intentions of the prison administrative authority are reflected by the affidavit of Commissioner Lee which was made a part of the Application For Stay and appears as Appendix "C" at page 47 of the "Brief for Appellants" and in his testimony appearing on pages 159 through 185 of the record. Consequently, there is no justification for any apprehension that honest discretion would not be exercised.

It has been said that hard cases make bad law. It would be a tragedy if this Court left unmodified the strict and rigid order of the lower court by incorrectly assuming that this case is harder than it truly is, i.e., if this Court felt that sensible and reasonable discretion could not be exercised by the prison authorities of Alabama.

POINT II

During the course of oral argument the Chief Justice inquired if it were not necessary for the Court to order total and complete prison integration to prevent the maintenance of a defacto system of segregation through the practice of Alabama trial judges in sentencing prisoners to specific prisons according to their race. The answer is no because there is no such practice in Alabama and none is permitted by Alabama law.

The sentencing procedures are definitely settled and prescribed by Alabama law; the trial judges do not sentence prisoners to a specific prison. The sentence of the trial court simply states that the defendant is sentenced to "the penitentiary" for a specified term of years, etc.

Title 15, Section 328, Code of Alabama 1940, Recompiled 1958, authorizes the trial court to impose the "term" of imprisonment in the penitentiary, except in cases where this power is expressly conferred on the jury.

Neither the trial judge nor the jury selects or names a particular prison to which a convict is to be sent.

Title 15, Section 325, Code of Alabama 1940, Recompiled 1958, provides:

> "The only legal punishments, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, *imprisonment in the penitentiary,* which includes hard labor for the State, and death by electrocution." (Emphasis supplied).

It is beyond the power and authority of the trial court to specify the institution wherein the prisoner is to serve his

sentence. Any such direction by the trial judge would be mere surplusage and without legal effect.

Once a prisoner is sentenced to "the penitentiary" he comes under the jurisdiction of the Board of Corrections of Alabama and the authority of the Commissioner of Corrections for commitment to a specific place of confinement. The convicts are assigned to particular prisons, and to particular cells in each prison, by and under the authority of the appellant members of the Board of Corrections of Alabama and the appellant Commissioner of Corrections of Alabama. Only the Board of Corrections has the power to specify the particular institution to which the convict is committed and it acts through its Commissioner of Corrections. Title 45, Section 3, et seq., Code of Alabama 1940, Recompiled 1958.

Title 45, Section 26, Code of Alabama 1940, Recompiled 1958, provides as follows:

> "Temporary confinements of convict pending removal. —When any convict is sentenced to the penitentiary, the judge of the court in which the sentence is had shall order such convict to be confined in the nearest secure jail; and the clerk of the court shall at once notify the director as to the jail where such convict is confined, and forward to him a copy of the judgment entry and sentence in the case, and inform him if any special care be necessary to guard such convict; and thereupon the director shall direct where such convict shall be taken for confinement or hard labor."

Of course, the powers of the director are now exercised by the Board of Corrections. Title 45, Sections 10(1), 10(5) and 10(8), Code of Alabama, 1940, Recompiled 1958.

It results, therefore, that a defendant, regardless of race, having been convicted, is sentenced to "the penitentiary" by the trial court. The Board of Corrections, acting through its Commissioner, then classifies and assigns the prisoner to one of the penal institutions in Alabama. This latter is not a function of the court. The Chief Justice's concern, though understandable, was unnecessary.

POINT III

In the oral argument before the Court appellants referred to two cases not cited previously in the printed briefs furnished the court.

The opinion by *Ray v. Pennsylvania*, 263 Fed. Supp. 630, was referred to by appellants, not because of any binding precedent but because the opinion of the District Court trial judge cogently summarized reasons for leaving a wide latitude of discretion in the prison authorities in handling racial matters.

Reference was also made to the case of *Alfred Earl Toles v. Hon. Nicholas Katzenbach, acting Attorney General of the United States et. al.*, case #21,268 decided by the United States Court of Appeals for the Ninth Circuit, September 27, 1967, and reported in part in 36 Law Week 2235. Photocopies of the full decision were hand delivered to the Justices. At the time of the preparation of this brief the citation in the Federal Reporter is not yet available.

Mr. Justice White in effect asked if our appeal should fall if the Ninth Circuit Court was wrong in the Toles case. The answer is no because the Toles case raises only one factual situation and is simply one illustration of an administrative

decision made within the discretionary authority of prison officials. This Court might view that particular factual situation as requiring a different decision in the exercise of reasonable discretion. The Toles case is an illustration of the situations which may develop requiring the exercise of judgment and discretion on the part of prison officials. The Toles case adds weight to our contention that prison officials should retain ample power to administer prison affairs to effectively deal with racially tense situations. We seek to be relieved of the rigidity of the lower court's order and its requirements for making periodic reports, particularly in areas where the Commissioner of Corrections has no authority to require individual jailers to report to him.

POINT IV

The question was asked by the Court, probably through Mr. Justice Fortas, as to a citation in the record showing that appellant Robert K. Austin, as warden of the city jail of Birmingham, Alabama, was or was not representative of all of the other wardens and jailers of the cities and towns of Alabama. First, there is absolutely no evidence, self-serving or otherwise, tending to prove such representative capacity. The only evidence negates such a contention. See the record at page 179: Question (to defendant A. Frank Lee) "Then you would—in your opinion, would you say, in your opinion, there is a substantial difference between the smaller town jails in Alabama and the city jails and the Birmingham City Jails and facilities, supervision, and the type of—and the —the type of control between—between these?" Answer: "Yes Sir."

It is not necessary that defendant Austin be found as a representative of "the class" to rule on the constitutionality of the State's statutes which on their face require complete

and permanent segregation of the races in all the Alabama prison facilities. The constitutionality of those statutes is clearly before the Court without resort to a decree against the defendant Austin as warden of the city jail of Birmingham, Alabama, "as representative of that class including all other wardens and jailers of cities and towns of Alabama," or expressed differently, it is not necessary to resort to this strained construction of a class representative to contest the constitutionality of the statutes involved.

POINT V

A number of questions were asked by the members of the Court during oral argument and from those questions it appeared that some members of the Court felt that perhaps the objections of the appellants to parts of the order of the District Court could be removed by delay, or by the mere passage of time, and therefore, the idea was expressed that appellants should have applied to the District Court for more time. This confusion of objectives probably resulted in part from the appellants' representation that new, modern and completely desegregated prison facilities would be completed by June, 1969, and that when these new facilities are available, complete desegregation will be facilitated. That argument was directed to only one aspect of the problem of our state prison officials created by the lower court order.

Arbitrary racial segregation would end if this Court affirmed the declaration of the unconstitutionality of the State statutes requiring it. Prison authorities would begin to integrate the prisons as fast as possible as a matter of policy. This policy would be aided by the opening of the new facilities, and not initiated by it. Indeed, substantial progress has already been made even though the lower court's order was stayed.

If arbitrary racial segregation were all that was covered by the District Court order, an extension of time for compliance with the order might be sufficient; however, the District Court, except in a very narrow area, forbade all segregation including such as would result from the exercise of reasonable discretion—which discretion is absolutely essential to prison operation, and is frequently necessary to head off dangerously threatening situations.

In other words, an extension of time alone would not make the District Court's order acceptable. The basic error of unduly restricting freedom of action would remain. We urge the Supreme Court to modify the District Court's order to permit the reasonable exercise of discretion by prison authorities, even though the exercise of discretion may sometimes result in some separation of the races. With the State statutes requiring arbitrary segregation declared unconstitutional, the Alabama prison system would be no different from the Federal prison system or other state prison systems. Prison authorities everywhere should be left with sufficient discretion and inherent authority to face varying situations as they arise without a rigid statute requiring arbitrary segregation or an equally objectionable rigid court order requiring arbitrary integration.

POINT VI

We must face the fact that many prisoners have unreasonable and hardened prejudices; it behooves all concerned to take that into consideration when dealing with them. Those existing prejudices require consideration in at least two aspects; one, they present a source of danger to inmates; and, another, they indicate a feeling on the part of some prisoners that they are being imposed upon when placed with prisoners

of another race and that the imposition is added punishment not required by their sentence and constitutes cruel and unusual punishment. Perhaps such an emotional attitude is unreasonable; but if it exists, to ignore it could be a serious (and perhaps an unnecessary) source of friction and trouble.

This Court is moving in an uncharted sea with no legal precedent and without a sufficient accumulation of factual situations and developments to guide it. Therefore, common sense and good judgment must be its polestar. Inconceivable harm may result from an injudicious decision in this case. It is our contention that the trial court went too far and too fast. Let it not be said with justification that the Federal judges rush in where angels fear to tread.

Since our argument does not depend on statutes and established law as much as reasoning, the following editorials are called to the attention of the Court for the light they may throw on the problem. These editorials appeared in the Montgomery Advertiser* over the last year.

THE MONTGOMERY ADVERTISER
WEDNESDAY, DECEMBER 14, 1966

Stone Walls Do Not A Prison Make

ASIDE FROM a strict interpretation of the law, which is probably accurate, it is hard to understand what democratic

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* The Advertiser is a widely recognized newspaper of national repute, noted for its editorial shafts directed at many activities of the Wallace administrations, including those related to the school desegregation case recently decided by this Court, wherein the editorials correctly predicted the consequences of the position taken by the State.

principle is served by the federal court order desegregating all Alabama prisons and jails — state, county and city.

Prisoners have rights of course, but this does seem to stretch the point. Worse, it subjects already understaffed prisons and jails to a serious disciplinary problem which may arise between white and Negro prisoners forced into close association.

In general, those who find themselves behind bars are not notably interested in brotherhood and take a dim view of those of the opposite race. It's easy enough for the court to say, by implication, that it is the duty of the jailors to prevent inmates from killing each other for reasons of racial unenlightenment, but the woeful shortage of competent guards mocks this nicety.

The "right" of prisoners to mingle with those of another race is pretty far-fetched, when segregation by age, conduct, criminal record and, of course, sex is continued. The world behind bars is hardly a microcosm of democratic Utopia; any attempt to make it appear so is a bit ludicrous, whatever the law says.

Presumably, wardens will still be free to separate trouble-makers, even if race is the basis of the trouble, but they may be forced to permit one act of violence first by way of proof.

The whole thing strikes us as passing silly.

If and when the court is called on to order the placement of voting machines in prisons and jails, for those whose rights of citizenship have not been revoked, let there be no gerrymandering by cell blocks.

THE MONTGOMERY ADVERTISER
WEDNESDAY, MAY 31, 1967

Stone Walls Do Not A Prison Make (Cont.)

WHEN A FEDERAL COURT ruled that segregation by race in Alabama jails and prisons was unconstitutional, we hooted that this was reducing the doctrine of civil liberties to the absurd. We still think so and hope the U.S. Supreme Court, which has agreed to review the case, will agree.

The argument by appellants for the state is that prisoners lose the right to select their associates in prison. If this is not the case, if states cannot separate prisoners by any factor they chose (sic) might not another guardhouse lawyer question segregation by type of offender or even by sex?

When a man is imprisoned he loses his freedom of movement and, by logical extension, his social freedoms. Even if this (sic) held as technically violative of a prisoner's rights, the overriding consideration should be the maintenance of order.

Men behind bars are there, in general, because of antisocial behavior. They are not the best candidates for enforced brotherhood even among members of their own race. The tensions of confinement produce burning animosities. Integration of prisoners would increase this incalculably with no conceivable service to prisoners or society.

The added cost of maintaining discipline—a euphemism for preventing fights and killings—would be greater than the state should reasonably be expected to bear.

In a word, it's just plain silly. Prisoners, by and large, are not very egalitarian minded. *If one hates red heads, he should be segregated from red heads, or they from him. If he resents forced association with those of another race — as most prisoners probably do — it is hard to believe how either group would benefit or how their rehabilitation would be served thereby.*

Whatever the courts say, racial feelings—which work both ways—are a significant problem in prison discipline. Theoretical law will not change this, unless for the worse. (Emphasis supplied).

THE MONTGOMERY ADVERTISER
TUESDAY, JULY 18, 1967

Brotherhood Behind Bars Failed Horribly

THE TRAGIC DEATHS of 37 prisoners in a Florida prison camp Sunday night is grisly evidence of what we were talking about in criticising the federal court order requiring the desegregation of Alabama jails and prisons.

The 37 Florida convicts died in a fire started during a brawl between white and Negro prisoners, who had been fighting since the camp was integrated last week.

We noted May 31:

"When a man is imprisoned he loses his freedom of movement and, by logical extension, his social freedoms. Even if this is held as technically violative of a prisoner's rights, the overriding consideration should be the maintenance of order.

"Men behind bars are there, in general, because of anti-social behavior. They are not the best candidates for enforced brotherhood even among members of their own race. The tensions of confinement produce burning animosities.. Integration of prisoners would increase this incalculably with no conceivable service to prisoners or society . . ."

Racial feelings are a significant problem in prison discipline. Nothing can alter this fact. The Florida tragedy stands as hideous evidence that a prison is a poor place for experimenting with togetherness by force. We hope the U.S. Supreme Court, which is scheduled to review the Alabama case in the fall, will exercise some common sense.

CONCLUSION

It is respectfully requested that the decision of this Court go no further than to affirm that part of the order, decree and judgement of the court below which held the named statutes invalid and that that part of the order be reversed which places any mandatory requirements upon the appellants to make reports to the court or otherwise subject their administrative acts to routine review.

We earnestly contend that full freedom should be allowed the wardens, jailers and prison administrators of Alabama to maintain prison discipline and security in their prisons without a minute routine review by a Federal court. Prison administrative officials who are charged with maintaining law and order in a prison should be accorded sufficient latitude to permit them to do so. To do otherwise will unnecessarily expose our prisons to riots and other disorders.

Respectfully submitted,

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As Warden of the City Jail of
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CERTIFICATE OF SERVICE

I, Nicholas S. Hare, one of the attorneys for the said appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of December, 1967, I served copies of the foregoing Brief for Appellants by mailing in duly addressed envelopes, with first class postage prepaid (airmail where necessary), to the following attorneys for appellees:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama,

Appellants,

v.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLEES' MOTION TO FILE REPLY BRIEF AND REPLY BRIEF TO THE SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, ET AL., *Appellants*

v.

CALIPH WASHINGTON, ET AL., etc., *Appellees*

APPELLEES' MOTION TO FILE REPLY BRIEF TO THE SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

Appellees hereby move the Court to permit the filing of a reply brief to the Supplemental Brief of Appellants After Argument heretofore filed herein by special leave of this Court granted on December 4, 1967.

Respectfully submitted,

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REPLY BRIEF TO SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

Response to Appellants' Point I

Appellees' counsel did contend in oral argument that under Alabama's present state administration prison officials could not be expected to abolish racial distinctions in penal facilities. This contention was based upon no misunderstanding of law. It was based, instead, upon a rather clear understanding of fact.[1]

Indeed, the Board of Trustees of the University of Alabama is "self perpetuating" and is generally considered the least subject of all the agencies of Alabama's government to outside political interference. The Governor himself serves only as an ex-officio member and then only for the term of his office. That mattered little in 1963 when then Governor George C. Wallace stood in an appropriately designated spot "in the school house door." That stand, albeit a brief one, symbolized the then well known now universally conceded attitude of Alabama's administration and the reluctance or inability of presumably independent state agencies to stand in opposition to it.

That, Mr. Wallace and wife, have achieved political pre-eminence in Alabama is not subject to proof in this Court. And a "stand-in-the-jail house door" well may not occur. But that the striking down of statutory racial bars in Alabama would result in voluntary state

[1] Two members of the five member Board of Corrections (appellants Button and Cashion) are serving under appointments made by previous Gorevrnors. Two other members (appellants McLaughlin and Mitch) were appointed or reappointed by Governor George C. Wallace. The fifth appellant, Mr. Luttrell's, term has expired and he is serving until his successor shall have been appointed by Governor Lurleen B. Wallace.

action taxes credulity. The voluntary striking down of racial bars in Alabama's penal and detentional institutions simply has not and cannot occur.

All too often in the recent past federal compulsion through court-orders, withdrawals of federal economic assistance, the enactment of statutes, the appointment of voter registrars and federal prosecutions for crimes of racial violence has proven necessary to obtain simple compliance with the clear mandates of the Constitution. And, on more than one occasion the use of troops has proven necessary to enforce the mandates of United States courts.

Thus Alabama's recent if not total history clearly demonstrates that there a court order is not merely a legal means to a constitutional end; almost as importantly it sometimes serves as a mantle necessarily worn by state officials conscientiously attempting to comply with the requirements of law in a racially changing society.

Response to Appellants' Point II

The Appellants in this case are responsible for the present, past and future assignment of prisoners to penal and correctional institutions.

Response to Appellants' Point III

Alfred Earl Toles v. *Hon. Nicholas Katzenbach, etc, et al.* 36 L. W. 2235, —— F. 2d —— (No. 21,268 9th Cir. Sept. 27, 1967) clearly establishes a sort of "Proposition 14" for United States prisoners. *Cf. Reitman* v. *Mulkey,* 387 U.S. 369 (1967). *Toles* seems clearly erroneous. But, based on *Toles* it may be assumed that recalcitrant prison officials allowing old prejudices to govern correctional institutions might fashion

a myriad of method labelled "discretion" in order to preserve the racial integrity of separate, if unequal, prison facilities and opportunities. Cf. The use of discretion by state voting officials at the heart of *United States* v. *Mississippi*, 380 U.S. 128 (1965) and *Louisiana* v. *United States*, 380 U.S. 145 (1965).

Response to Appellants' Point IV

The District Court found the warden of the Birmingham City Jail a proper class representative. (See also R. 171-172)

Response to Appellants' Point V

Race simply cannot in and of itself ever be a valid standard for classification of prisoners. The example cited in oral argument was the recent confinement of Dr. Martin Luther King, Jr., in the Bessemer and Birmingham Divisions of the Jefferson County Jail *Walker* v. *Birmingham*, 388 U.S. 307 (1967). The security of any prisoner is a paramount consideration of prison administration. The King case presents an excellent example. For it is not merely white prisoners from whom he and his associates must of necessity have been separated. For to have confined Dr. King and his associates with *certain* Negro prisoners could have created security problems. The same may be said of a convicted member of a racist group. The Klansman in a penitentiary may find himself cast in with *certain* members of political, religious or ethnic groups who might be more dangerously antagonistic to him than some Negroes. Indeed, in prison work situations it would be rare if southern racists and southern Negroes were found unable to work together, side-by-side, in at least as amicable a manner as they may have

at an unlawful still located in a wooded area in an Alabama county. In short, the question should not be related to the race of the prisoner but, instead, to the prisoners themselves.

Response to Appellants' Point VI

That "Federal Judges rush in where" recalcitrant state officials, will not "tread" is not the fault of the Courts. But, in Alabama it has proved the salvation of the Constitution.

The newspaper editorials speak for themselves. And, although that editorial entitled "Brotherhood Behind Bars Failed Horribly" (Appellants' Supplemental Brief, p. 14) appears inaccurate according to other published reports, it is admitted that upon occasion the Montgomery *Advertiser* has been critical of the Wallace administration. Indeed, the viewpoint expressed in the editorials reprinted by Appellants do seem to express a more moderate view than Alabama's present administration.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1967.

Frank Lee, Commissioner of Corrections of Alabama, et al., Appellants, *v.* Caliph Washington et al.	On Appeal From the United States District Court for the Middle District of Alabama.

[March 11, 1968.]

Per Curiam.

This appeal challenges a decree of a three-judge District Court declaring that certain Alabama statutes violate the Fourteenth Amendment to the extent that they require segregation of the races in prisons and jails, and establishing a schedule for desegregation of these institutions. The State's contentions that Rule 23 of the Federal Rules of Civil Procedure, which relates to class actions, was violated in this case and that the challenged statutes are not unconstitutional are without merit. The remaining contention of the State is that the specific orders directing desegregation of prisons and jails make no allowance for the necessities of prison security and discipline, but we do not so read the "Order Judgment and Decree" of the District Court, which when read as a whole we find unexceptionable.

The judgment is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1967.

Frank Lee, Commissioner of Corrections of Alabama, et al., Appellants, *v.* Caliph Washington et al.

On Appeal From the United States District Court for the Middle District of Alabama.

[March 11, 1968.]

Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice Stewart, concurring.

In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination.